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No. 09- 091461

IN THE

Supreme Court of the United States

ASSOCIATION OF CHRISTIAN SCHOOLS INTERNATIONAL, *et al.*,

Petitioners,

v.

ROMAN STEARNS, in His Official Capacity as Special Assistant to the President of University of California, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The University of California system (UC) requires its 86,000 in-state applicants, and California State University requires its 615,000 applicants each year, in order to be eligible for regular admission, to take 15 year-long courses that have been approved by UC, whether the applicant's school is a public, private, or religious high school. In its review, UC regularly rejects courses, regardless of their teaching standard content and skills, if they add a religious viewpoint, in Catholic, Jewish, and Protestant schools. The nearly 150 instances shown by UC's documents (App. 103a, ER443-86, 750-77) include UC's history course policy which was characterized in the UC committee minutes as meaning that "We simply do not accept supernatural causes" (ER1516-17); UC's rejection of the elective "Social Justice" at Verbum Dei High School on the ground that the text "only provides one point of view on the topics," "a Catholic point of view" (Ex.747); and UC's rejection of the "Holocaust and Human Behavior" course at New Community Jewish High on the ground of a "[n]eed to expand the perspectives for this course" (ER2400) because it was "too slanted towards Holocaust with no other perspective." (ER2411.)

The question presented is:

Whether the Ninth Circuit erred in holding constitutional under the First and Fourteenth Amendments the University of California system's rejection of courses in religious high schools (Catholic, Jewish, and Protestant) when they add to standard content a religious viewpoint, by

A. Holding that viewpoint discrimination by state

universities and agencies against religious speech in private schools is constitutional, directly contrary to this Court's decisions barring viewpoint discrimination in *Rosenberger*, *Lamb's Chapel*, *Widmar*, *Southworth*, *Boy Scouts*, and *R.A.V.*, and the Seventh, Eighth, Tenth, and Fourth Circuits;

B. Ruling that only the minimal rational basis test must be met by infringements of freedom of speech and other First Amendment protections when "government provides a public service," directly contrary to this Court's decisions using strict scrutiny and other circuits' decisions, by vastly extrapolating the *Finley*, *American Library*, and *Forbes* decisions beyond government selection of speech for subsidy to private speech involving any "public service"; and

C. Reinterpreting constrictively each First Amendment clause to uphold, the association standing test to exclude, and the overbreadth doctrine to ignore, the 150 other UC course rejections for adding a religious viewpoint to standard content, in conflict with this Court's decisions.

LIST OF PARTIES

The plaintiffs/petitioners in the court below are Association of Christian Schools International, Calvary Chapel Christian School (a Division of Calvary Chapel of Murrieta, Inc.); A.T., by parent G. Tally; J.G., by parent A. Guzon; T.C., by parent J. Cherney; K.B., by parent D. Brodmann; G.S., by parent K. Shean; S.O., by parent D. Ono; W.L., by parent W. Lotherington.

The defendants in the court below are Roman Stearns, in his official capacity as Special Assistant to the President of University of California; Susan Wilbur, in her official capacity as Director of Undergraduate Admissions of University of California; Judy Sakaki, in her official capacity as Associate Vice President for Student Academic Services of University of California (substituted for Dennis Galligani); Robert C. Dynes, in his official capacity as President of the University of California; and Mark Rashid, in his official capacity as Chair of Board of Admissions & Relations with Schools (BOARS) of University of California (substituted for Michael Brown).

Appearing as *amicus curiae* for petitioners in the Ninth Circuit were American Center for Law and Justice for Catholic League for Religious and Civil Rights, Common Good Foundation, and Seventh-day Adventist Church State Council; and National Legal Foundation; and in the district court were a group of law school professors discussing implications for Catholic universities. (ER1179.) Appearing as *amicus curiae* for respondents in the court below were California State University and University of Nevada; California Council for Science and Technol-

ogy; American Historical Association and Organization of American Historians; and American Association of University Professors.

RULE 29.6 STATEMENT

Petitioners Association of Christian Schools International and Calvary Chapel Christian School's parent, Calvary Chapel of Murrieta, Inc., are nonprofit organizations, and as such no parent or publicly held company owns 10% or more of their stock.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit, dated January 12, 2010, is unreported and appears at 2010 WL 107035. App. 1a. Its denial of rehearing en banc, dated March 1, 2010, is unreported. App. 159a. The Ninth Circuit affirmed the facial and as-applied summary judgment decisions of the United States District Court for the Central District of California, dated March 28, 2008 and August 8, 2008, reported at 679 F.Supp.2d 1083 and 678 F.Supp.2d 980 respectively, App. 42a and 12a; the decision of the district court denying motions to dismiss was dated August 8, 2006. App. 121a.

The Ninth Circuit opinion, and the district court opinion it affirmed, uphold University of California's policy and well-established practice of rejecting private schools' courses that adequately teach standard content if they add a religious viewpoint. In doing so, the opinions make breathtaking departures from settled First Amendment precedent of this Court and other circuits, as they hold that viewpoint discrimination is permissible by a state university system, that only rational basis review applies to First Amendment violations when "government provides a public service," and that First Amendment provisions, standing rules, and the overbreadth doctrine may be reinterpreted constrictively to uphold UC's pattern or practice of 150 course rejections for adding religious viewpoints.

STATEMENT OF JURISDICTION

The Ninth Circuit opinion was rendered on January 12, 2010, App. 1a, and the petition for rehearing en banc was denied on March 1, 2010, App. 159a.

This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amends. I, XIV. App. 161a.

STATEMENT OF THE CASE

This case affects 86,000 applicants annually to the ten campuses of University of California (UC)(ER1451), and the 615,000 applicants annually to the 23 campuses of California State University (CSU), as well as students at other state universities such as University of Nevada (which filed an amicus brief in the Ninth Circuit). It determines whether applicants to UC from ACSI's 800 schools in California, and 3200 schools elsewhere (ER1519), and from the large number of students in Catholic schools and Jewish schools, will continue to be discriminated against when their schools add to standard course content their particular religious viewpoint.

Even more importantly, this case determines whether the Ninth Circuit's tunnel around the First Amendment will remain open, allowing viewpoint discrimination and using the rational basis test when religious speech is involved, as well as constrictively interpreting each First Amendment clause for religious speech, standing rules for the nation's largest religious school organization, and the overbreadth doctrine for discriminatory treatment of religious speech. In the Ninth Circuit, religious speech in religious schools is less protected than commercial speech, flag burning, and pornography.

Most of the facts are undisputed because they come from UC's own documents rejecting courses and stating its policies.

A. Framework of UC's Review and Approval of High School Courses as a Condition of

Regular Admission.

UC is the only university, and California is the only state (ER1048, 1485, 1493), that reviews high school course descriptions, and asserts the right to approve or reject them. UC does so in connection with its 86,000 in-state applicants each year for its ten campuses, and UC's review is adopted and followed by CSU's 23 campuses as well (ER1406), together constituting all state college education in California. UC's review is merely of course descriptions of 1-5 pages; "UC does not interview the teachers, observe classroom instruction, or test the students." App. 49a,50a. The review is by staff, not faculty (ER961-62, 1459), with rare exceptions.

Eligibility for regular admission[1] to UC requires taking 15 year-long courses that UC has pre-approved (ER1436),[2] and is how 98.8% of students (ER1446) are admitted to UC. A student who has not taken 15 year-long courses pre-approved by UC is ineligible for regular admission.[3] The remaining 1.2% of students are admitted on the basis of "exceptionally high scores on standardized tests" or excep-

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[1] Which UC terms "statewide eligibility" and "local eligibility." (ER1446.) 92.5% are eligible from the first, and 6.3% from the second. *Id.*; App. 122a.

Because the Ninth Circuit opinion did not cite facts, and the district court cited only facts from UC's brief, citations are provided to the Excerpts of Record (ER) for the Court's convenience, pursuant to S.Ct.R.12.7.

[2] These must be (a) 2 history-social sciences, (b) 4 English, (c) 3 mathematics, (d) 2 laboratory sciences, (e) 3 in languages, (f) 1 arts, and (g) 1 elective year-long courses. App. 123a.

[3] Such a student is ineligible at the 10 campuses of UC and the two-dozen campuses of California State University, which follows the same requirement. (ER1048,1406.)

tional athletic or artistic ability. ER127a & n.2.

In 2004, UC began to reject courses that contain adequate standard content but add a religious viewpoint, implementing a policy or practice that is described below. (ER2413, 1483, 1477.) When UC has rejected sufficient courses in any required subject, a school's students are rendered ineligible for regular admission, and that has been the case in at least 10 ACSI member schools. (ER1530, SER3109-3279.)

B. ACSI Members' Addition to Standard Course Content of a Religious Viewpoint.

ACSI, the nation's largest private school organization with 4000 member schools (ER1519),[4] and Calvary Chapel (a member school) and students, filed this lawsuit on behalf of ACIS member schools to challenge UC's rejection of courses with standard content because of an added religious viewpoint, claiming that was viewpoint discrimination in violation of the First Amendment. ACSI schools teach standard content (SER3715-17, ER643-44, 422), which is defined by California's content standards for each subject (Exs.675, 682, 685), which virtually all of the 800 ACSI schools in California meet. Virtually all of the ACSI member schools in California are accredited by the regional accreditation organization, Western Association of Schools and Colleges. (ER736, 734.)

ACSI member schools, besides teaching standard course content, add a religious viewpoint in each

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[4] In 110 denominations, with over 800 schools in California. (ER1519.)

subject. They do so as an important part of the schools' and students' religious speech and belief, and as an integral part of their reason for existence. (ER733, 3716-17.) Religious schools generally exist to add an alternative viewpoint to what public schools offer. (ER733, 643-44, 617, 736.) Doing so does not diminish the teaching of standard content (ER606, 610, 617), but instead enriches it and challenges critical thinking. (ER727, 609.)

C. UC's Rejection of Religious School Courses for Addition of a Religious Viewpoint, While Approving Courses that Add Secular Viewpoints.

Under its 2004 policy or practice, UC rejected nearly equal numbers of Protestant, Catholic, and Jewish school courses with standard content because they added a religious viewpoint (ER443-86, 750-77, 1981-2454), before rejections were stopped or slowed after the filing of this suit. The district court acknowledged that ACSI identified "more than 150 courses rejected by UC." App. 103a.

UC's rejections of courses with standard content because of added religious viewpoints have included all subject areas except mathematics: (1) elective courses (religion, ethics, philosophy), (2) history and social science courses, (3) English courses, (4) any courses with an added providential viewpoint, and (5) science courses. However, UC approves courses with secular viewpoints (as it should), whether feminist, African-American, environmentalist, or otherwise. The following examples of UC's viewpoint discrimination toward added religious viewpoints were specifically brought to the Ninth Circuit's attention:

1. Examples of Rejected Elective Courses (Religion, Ethics, Philosophy)

UC rejected "Women's Studies" from Saint Mary's Academy (ER2368-75). UC's reviewer asked the other reviewers, "Does anyone think this is too narrow a viewpoint? I was going along and thinking it was a pretty good course until the outline mentioned the Catholic point of view in the texts." (ER2369.) The reviewers then unanimously rejected the course for being "too specific in viewpoint." (ER2368. *Accord* ER2322.) Thus, the course was "pretty good" except for its "Catholic point of view," which is viewpoint discrimination against religious speech.

UC similarly rejected "Jewish Philosophy" from New Community Jewish High (ER2421-33). Petitioners' philosophy expert witness (a UC professor) said the course covered such very sophisticated philosophy readings that he was amazed this college material was taught in a high school. (ER683-86, 373-77, 380-81.) UC rejected the course for a "[o]ne-sided perspective. If expanded has potential." (ER2436. *Accord* ER365-79, 685, 687-88.) The course was not deficient, except its "[o]ne-sided perspective"—its Jewish viewpoint added to more-than-standard content, which is viewpoint discrimination.

By contrast, UC regularly approves courses with a single secular viewpoint, such as "Women's Studies and Feminism," "Diversity Studies," "Post Modern Questions in Art," and "Multicultural Perspectives." (ER1469, Costales Dep.at 178-180; *accord* ER1703;Ex.754)

2. Examples of Rejected History/Social Science Courses

UC rejected "Christianity's Influence on American History" from plaintiff Calvary (ER1981-99), on the ground, "Need more than a religious perspective, too slanted toward Christianity." (ER1994.) The only reason given was the added viewpoint "slanted toward Christianity," which is viewpoint discrimination. The course sufficiently covered standard content so that UC's expert witness believed it should have been approved. (ER912.)

UC rejected "History of Christianity" from Cathedral Catholic High School (ER2328-31), stating as the reason, "We would expect a course in the History of Christianity to include more than one Christian viewpoint." (ER2328.) The reason was not any deficiency except "one Christian viewpoint," which is viewpoint discrimination against religious speech.

By contrast, UC regularly approves history and social science courses with a single secular viewpoint (ER1127, 1129-31, Ex.678), and has a policy statement that "history courses may view historical events from a particular perspective, such as African-American history, Woman's history, or the Latin American Experience" (ER1408; *accord* ER1469) —but not from a religious perspective. UC interprets this policy to allow only the listed perspectives. History courses are approved with African-American, feminist, or Latino perspectives, but not with a perspective of "Christianity's Influence on American History." (ER1981.)

3. Examples of Rejected English Courses

UC rejected "Grammar and Composition" from Cornerstone Christian School (Ex.621), because of "concerns about the 4th quarter reading material. . . .The curriculum in general looks fine." After three quarters of standard secular literary works, the fourth quarter curriculum (not even required by UC for a full-year English course) listed the books *Foundations of Christian Education, The Philosophy of the Christian Curriculum*, and *Nurturing Children in the Lord*. UC found the "curriculum in general looks fine" except for these "4th quarter" books with an added religious viewpoint, which is viewpoint discrimination against religious speech.

UC also rejected "Introduction to the New Testament" from St. Bernard's Catholic School as an English course, on three grounds including that UC 'could consider this as a literature course if different viewpoints were reflected in the reading list.' (ER2264.)

By contrast, UC regularly approves courses with a single secular viewpoint, such as "Feminine Perspectives in Literature," "Gender Roles in Literature," "Gender, Sexuality and Identity in Literature," "Literature of the Counterculture," and "Literature of Dissent." (ER1469, Costales Dep. at 178-180; *accord* ER2267-2307, 1469.)

4. Examples of Rejected Courses with Providential Explanations

When UC rejected "American History" and "World History" courses at Armona Union Academy (ER2009), its reviewer stated she was "leery of how much religion we can allow in specific courses. The text books they are using are fine but am concerned with the following statements. . . .'The role of God in history and the principles of Christianity form a backdrop for our analysis of historical events and trends.'". . . (ER2022.) The texts were "fine" but the viewpoint of a "role of God in history" was fatal, which is viewpoint discrimination against religious speech.

UC rejected the "World History" course at King's Academy, while saying "the outline looks decent" (ER2035), on the basis that, in a religious viewpoint added to standard course content, "it attributes historical events to supernatural causes" (ER2025), after UC's reviewer concluded the course "is fundamentally flawed, since it presupposes that a Christian god [*sic*] has created and governed the world." (ER2036.) UC's approach was approved by UC's officer in charge of course review, Vice President Susan Wilbur (*e.g.*, ER2027).

These are UC's actual reasons for rejection, as stated in its documents. The reasons that UC later gave to the particular schools often differed because UC sanitized them.

D. UC's Policy or Practice of Rejecting Religious School Courses for Addition of a Religious Viewpoint, While Approving Courses that Add Secular Viewpoints.

That this is a well-established UC policy or practice is shown not only by the nearly 150 course rejections acknowledged by the district court (ER443-86, 750-77), from which the foregoing examples are taken, but by UC's policy on elective courses (religion and ethics courses, App. 160a) acknowledged by the district court (App. 111a), and by policy directives from UC's officer in charge of course review, Vice President Susan Wilbur.

UC's Religion and Ethics Courses Policy states that approved courses may not add a single religious viewpoint. Its language is that "to be considered as history, social science, and English courses, courses in religion or ethics . . . should treat the study of religion or ethics from the standpoint of scholarly inquiry rather than in a manner limited to one denomination or viewpoint." App. 160a (ER1485). Wilbur interprets this single religious viewpoint rule to apply to all subject areas. (ER1996.) The policy makes the insulting assumption that study of a subject, such as ethics, from "one denomination or [religious] viewpoint" cannot be scholarly inquiry, while study from one secular viewpoint is not disqualified and can be scholarly inquiry. This policy, App. 111a, 55a, was the basis for rejection of many of the courses discussed *supra*.

UC's officer in charge of course review stated UC policy for history and social science courses. If "an American government course provides all standard material on the subject of American government accurately, and in addition, provides a Christian perspective on American government as the only perspective," then "we would probably not accept a single perspective." (ER969. *Accord*, ER1483-84, 963-

64.) Wilbur stated the same policy for English courses, science courses, and any courses adding a providential viewpoint, regardless of whether they teach standard content.[5]

By contrast, UC's Board of Admissions and Relations with Schools (BOARS) stated an opposite UC policy for added secular viewpoints: "history courses may view historical events from a particular perspective, such as African-American history, Woman's history, or the Latin American Experience" (ER1408; *accord* ER1469) This allows "a particular perspective," or a single viewpoint, so long as it is secular. UC's practice or policy has been to approve courses in all fields with an added secular viewpoint.

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[5] Her statements of UC policy include the following (*accord* ER963-64,966-69):

On rejecting English courses: Wilbur testified that, if "an English course, provides all standard material on English or literature, and in addition, provides a Christian perspective on the subject matter but not other perspectives," "we would probably not accept the course." (ER967-68.)

On rejecting science courses: Wilbur stated UC's "requirement that science be taught in a UC-approved science class, and religion taught elsewhere." (ER1528. *Accord* ER1477, 1497, 963.) When ACSI's president questioned her about courses that taught standard science content and added a religious viewpoint, Wilbur said that it did not matter if standard content was taught: "Your position appears to be that as long as a science course contains a certain amount of specified information, it does not matter what else is included in the course, we must approve it or we are violating your rights. We do not agree. . . ." (ER1528.)

On rejecting any courses with providential viewpoints: Wilbur created and sent out a form letter rejecting history courses that "attribut[e] historical events to supernatural causes" (ER2027; *accord* ER2036, 903), regardless of whether they adequately taught standard content.

There is no constitutional difference between singling out and discriminating against an added religious viewpoint, and singling out and discriminating against an African-American viewpoint, women's viewpoint, or Latino viewpoint. Each is viewpoint discrimination against speech.

UC's prohibition on an added religious viewpoint means that religious schools may not state that what they teach is true, in any approved class, as UC's expert witnesses confirmed. A Catholic school's philosophy course may not teach that Thomas Aquinas' teachings are true if its course is to receive approval. (ER915.) A religious school's history course may not teach as truths that "in God we trust," that America is "one nation under God," that we are "endowed by our Creator with unalienable rights," or that "the Ten Commandments are true," and receive approval. (ER923-28; *accord* ER910.)

This case does not involve a challenge to legitimate UC admission standards, or telling UC what it can teach within its halls. Instead, the case involves UC's viewpoint discrimination against courses in private religious high schools, which teach standard content, *because* they add a religious viewpoint. It involves UC telling private schools in California what speech is impermissible in order for their students to remain eligible for regular admission (the 98.8% of seats), and claiming that "reasonable distinctions among viewpoints are consistent with the First Amendment." (9th Cir. Br. 40.) Yet the other 49 states and all private universities do not find any need for such an admission policy, nor does UC find such a need when it considers admission of the 15%

of students who are either out-of-state (U.S.) or foreign.

The basis for federal jurisdiction in the District Court was under 28 U.S.C. §1331, and the case was timely appealed under 28 U.S.C. §1291.

REASONS FOR GRANTING THE PETITION

The Ninth Circuit erred in holding constitutional under the First and Fourteenth Amendments the University of California system's rejections of courses in religious high schools (Catholic, Jewish, and Protestant) when the schools add to standard content a religious viewpoint, by (A) allowing viewpoint discrimination against that religious speech by public institutions, (B) requiring only a rational basis to permit that viewpoint discrimination, and (C) constrictively reinterpreting the First Amendment, the association standing test, and the overbreadth doctrine to avoid considering UC's pattern or practice of 150 course rejections with similar viewpoint discrimination.

That flies in the face of this Court's oft repeated description of a central meaning of the First Amendment as a high barrier to viewpoint discrimination and content discrimination:

> But above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content. [Citations omitted.]. . . The essence of this forbidden censorship is content control. Any restriction on expressive activity because of its content would completely undercut the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *New York Times v. Sullivan*. . . .

Police Dep't v. Mosley, 408 U.S. 92, 95-96 (1972).

A. The Ninth Circuit's Ruling that Viewpoint Discrimination by State Universities and Agencies against Religious Speech in Private Schools Does Not Violate the First Amendment Conflicts with Decisions of This Court and the Seventh, Eighth, Tenth, and Fourth Circuits Barring Viewpoint Discrimination, and Warrants Granting the Petition.

UC's rejection of religious school courses with standard content for adding a religious viewpoint cannot be called anything but viewpoint discrimination, under this Court's forum and nonforum decisions alike. By contrast, UC consistently approves other school courses that add a nonreligious viewpoint. In effect, UC treats added religious viewpoints as toxic and religious speech as second class, or barely protected, while it discriminatorily finds nonreligious viewpoints harmless and secular speech fully protected. "Those choices and assessments, however, are not for the Government to make." *Citizens United v. FEC*, 130 S.Ct. 876, 917 (2010). The consequence of UC's viewpoint discrimination is that religious schools are penalized, by course rejection, for doing what most of them exist to do, and can only avoid viewpoint discrimination by self-censoring religious speech and implicitly teaching that religious viewpoints are irrelevant, outdated, and wrong.

Yet the Ninth Circuit ruled that UC is not shown to violate the First Amendment by such viewpoint discrimination. App. 3a-4a. It affirmed the district court's holding that UC officials "necessarily facilitate some viewpoints over others in judging the excellence of those students applying to UC," App.

25a,102a, instead of those officials conducting viewpoint-blind reviews of test scores, grades, and applications. It also affirmed the district court's holding that, to prevail, "Plaintiffs would have to show that Defendants [UC] rejected the challenged courses to punish religious viewpoints [animus][6] rather than out of *rational concern about the academic merit of those religious viewpoints.*" App. 25a (emphasis added). Yet if a religious school course teaches standard content and skills, it is none of government's business whether its added religious viewpoints have "academic merit," and certainly not government's right to discriminate based on "rational concern" about the added viewpoints.

UC has candidly admitted it practices viewpoint discrimination, and claimed a right to do so that was upheld by the courts below. As UC said in its appellate brief, "a course may be unsatisfactory precisely because it is too narrow or includes only one viewpoint," and so "UC considers whether a viewpoint or perspective (religious or not) promotes or detracts from a course's ability to meet faculty's expectations." (9th Cir. Br. 25 & n.24.) UC claims that educators "must have the discretion to evaluate and approve or disapprove the means, content, and viewpoints of academic expression," even though they "necessarily include judgments about speech." (*Id.*32, 33.) "Because UC's guidelines and course review further UC's educational mission, any reasonable distinctions among 'viewpoints' are consistent with the First Amendment," UC contends. (*Id.*40.)

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[6] The district court held that a "claim under the Free Speech Clause" required a showing of animus, including a claim that government disfavored viewpoints. App. 81a.

1. The Ninth Circuit's Justification of Viewpoint Discrimination Is Contrary to This Court's Decisions in *Rosenberger*, *Lamb's Chapel*, *Southworth*, *Boy Scouts*, *R.A.V.*, and to the Seventh, Eighth, Tenth, and Fourth Circuits' Decisions.

Assuming that analysis, the Ninth Circuit held that "plaintiffs have not alleged facts showing any risk that UC's policy will lead to the suppression of speech," and thus that UC's viewpoint discrimination does not facially violate the First Amendment. App. 3a. However, this Court has held that viewpoint discrimination alone shows precisely such a risk. "For the University, by regulation, to cast disapproval on particular viewpoints of its students risks the suppression of free speech," and beyond that "is a denial of their right of free speech." *Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819, 836-37 (1995). Moreover, this case involves not just a risk of suppression of speech, but an actual suppression of speech shown in the foregoing and other examples of UC's viewpoint discrimination.

The Ninth Circuit showed what it required to show a risk of suppression of speech when it held that "UC's rejections of the Calvary courses were reasonable and did not constitute viewpoint discrimination." App. 5a-6a. Yet Calvary's history course was rejected for a single reason: "Need more than a religious perspective, too slanted toward Christianity." (ER1994.) Calvary's government course was rejected for one reason: "Textbook is not appropriate. One sided presentation of history curriculum; needs balance." (ER2007.) Calvary's Eng-

lish course was rejected because it "does not offer a non-biased approach" (its added religious perspective) (ER2051) and the text "insists on specific interpretations" (again the added perspective) (SER0427). Calvary's religion course was rejected primarily because it violated UC's Religion and Ethics Policy because of adding "one . . . viewpoint." (ER2193, 1172.) Each rejection was viewpoint discrimination.

To the contrary, this Court's decisions have consistently struck down viewpoint discrimination as an "egregious" violation of freedom of speech. As *Rosenberger* held,

> When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant. . . . Viewpoint discrimination is thus an egregious form of content discrimination. The government must abstain from regulating speech when the . . . perspective of the speaker is the rationale for the restriction.
>
> . . . .
>
> The Court [in *Lamb's Chapel*] relied on no such distinction in holding that discriminating against religious speech was discriminating on the basis of viewpoint. . . .

Id. at 829, 832.

Discrimination against religious viewpoints, or religious speech, constitutes viewpoint discrimination. "Religion . . . provides . . . a perspective, a standpoint from which a variety of subjects may be discussed and considered." *Id.* at 831. That is why

"discriminating against religious speech was discriminating on the basis of viewpoint." *Id.* at 832. Consequently, *Rosenberger* found viewpoint discrimination in denying equal state university funding for student publications that "offer a Christian perspective." *Id.* at 830.

Lamb's Chapel similarly held that a public school "discriminates on the basis of viewpoint" in violation of freedom of speech, if it permits "presentation of all views about family issues and child rearing except those dealing with the subject matter from a religious standpoint." The six-member majority said (the rest of the Court concurring):

> The principle that has emerged from our cases "is that the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others."

Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384, 393, 394 (1993). *Accord Good News Club v. Milford Central Sch.*, 533 U.S. 98, 106-07, 110-12 (2001); *Cornelius v. NAACP*, 473 U.S. 788, 806 (1985); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983); *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503, 511 (1969).

Cases not involving forums condemn viewpoint discrimination exactly as forum cases do. *Southworth* stated that "[t]he whole theory of viewpoint neutrality is that minority views are treated with the same respect as are majority views." *Board of Regents v. Southworth*, 529 U.S. 217, 235 (2000). *Accord Boy Scouts v. Dale*, 530 U.S. 640, 654 (2000); *Hurley v. Irish-American Gay, Lesbian & Bisexual*

Group, 515 U.S. 557, 579 (1995); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 391-92 (1992) ("goes even beyond mere content discrimination, to actual viewpoint discrimination.... St. Paul has no such authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules."); *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 763 (1988); *Healy v. James*, 408 U.S. 169, 187-88 (1972).

Other circuits conflict with the Ninth Circuit's refusal to find viewpoint discrimination in UC's rejection of courses because of added religious viewpoints, even while approving courses with added secular viewpoints, as well as conflicting with the Ninth Circuit's willingness to uphold viewpoint discrimination if a mere rational basis is shown (Section B *infra*). The Seventh Circuit held it was viewpoint discrimination to refuse use of a municipal hall for programs promoting or espousing "a particular viewpoint" (a religious one), while allowing use for programs with multiple viewpoints. *DeBoer v. Village of Oak Park*, 267 F.3d 558, 571-74 (7th Cir. 2001). That circuit also ruled it was viewpoint discrimination to revoke campus recognition of a religious organization that denies voting membership to people not holding its beliefs, while recognizing other organizations with the same membership restriction. *Christian Legal Society v. Walker*, 453 F.3d 853, 865-67 (7th Cir. 2006). The Eighth Circuit held it was viewpoint discrimination to refuse religious viewpoints on specialty license plates, while allowing other viewpoints. *Roach v. Stouffer*, 560 F.3d 860, 869 (8th Cir. 2009). That circuit also ruled it was viewpoint discrimination to exclude teachers from after-school religious programs, but not from other after-school programs.

Wigg v. Sioux Falls School Dist., 382 F.3d 807, 814 (8th Cir. 2004). The Tenth Circuit held it was viewpoint discrimination to refuse one speaker because of his perspective, while allowing other speakers at a public meeting. *Mesa v. White*, 197 F.3d 1041, 1047-48 (10th Cir. 1999). The Fourth Circuit held it was viewpoint discrimination to charge religious groups and others for after-hour use of school facilities, while allowing free use for some groups. *Child Evangelism Fellowship v. Anderson School Dist.*, 470 F.3d 1062, 1067-68 (4th Cir. 2006).

2. The Ninth Circuit's Other Justifications of UC's Viewpoint Discrimination Also Conflict with This Court's Decisions.

The Ninth Circuit gave three justifications for UC's viewpoint discrimination. Each ignores the principles that "discriminating against religious speech was discriminating on the basis of viewpoint," and that viewpoint discrimination violates the First Amendment. *Rosenberger*, 515 U.S. at 832. *Accord Lamb's Chapel*, 508 U.S. at 393.

First, the Ninth Circuit found comfort in the ability of religious schools to "teach[] whatever and however they choose" in rejected courses. App. 3a. That is much like saying African-Americans were able to ride wherever and however they chose in the back of buses. This Court has "consistently rejected the suggestion that a government may justify a content-based prohibition by showing that speakers have alternative means of expression." *Consolidated Edison v. PSC*, 447 U.S. 530, 541 n.10 (1980). *Accord, FEC v. Wisconsin Right To Life*, 551 U.S. 449, 477 n.9 (2007). To limit religious perspectives to rejected courses

conveys the message that they are second class speech, barely tolerated, and that religious perspectives are improper or wrong in academic fields like ethics, history, social science, English, and science.

Second, the Ninth Circuit upheld the UC Religion and Ethics Courses Policy on the basis that "[p]rivileging one tradition or point of view is considered unacceptable and counter-productive in the scholarly study of religion at UC and similar colleges and universities." App. 4a. However, that is only one of two approaches (ER2214) to the scholarly study of religion (that of many secular universities), and the other approach, preferring the sponsoring religion, is widely used and considered academically acceptable by religiously-affiliated universities, such as Notre Dame, Catholic University, and Princeton. (ER2205-13, Ex.653-55, ER669.) UC's policy is wrong as a statement of "the" college and university approach (ER362, 381-85, 687-88), as well as facially viewpoint discriminatory.

Third, curiously, the Ninth Circuit denied "that UC has a well established practice of rejecting courses with standard content solely because they add a religious viewpoint." App. 4a. It is hard to imagine a more well-established practice or policy than nearly 150 course rejections, the officer-in-charge's directives, and the UC Religion and Ethics Courses Policy. The Ninth Circuit's only reason for its denial was "that UC has approved courses with religious content and viewpoints as well as courses that used religious textbooks." However, the opinion failed to note that most approved courses predate UC's implementation of the viewpoint discriminatory policy in mid-2004 (until stifled by this lawsuit in

mid-2006), and that UC's policy or practice rejects courses with a single religious viewpoint rather than courses with multiple religious viewpoints. (ER966,1996-97.)

B. The Ninth Circuit's Ruling that Only the Minimal Rational Basis Test Must Be Met by Infringements of Freedom of Speech and Other First Amendment Protections When "Government Provides a Public Service" Conflicts with Decisions of This Court and the Fourth, Seventh, and Eighth Circuits, and Warrants Granting the Petition.

UC's rejection of religious school courses with standard content for adding a religious viewpoint is held to the most rigorous standard, not minimal scrutiny, under this Court's decisions. Were UC to reject a private school course because of an added secular viewpoint, the rejection certainly would be seen as viewpoint discriminatory on its face and would be overturned.

Yet the Ninth Circuit eviscerated the standard that violations of freedom of speech must meet in order to be permitted—from strict scrutiny to the mere rational basis test—when "government provides a public service."[7] App. 2a. It affirmed the district court's holding that "Defendants' course approval de-

[7] UC does not provide a "public service" at all, by its requirement for course review in order for a high schools' students to be eligible for regular admission; it is instead an intrusion into private schools necessitated by UC's own self-appointed review. That regular admission is 98.8% of total admission. (ER1446.)

cisions are subject to rational basis review," requiring ACSI to show that each "course was irrationally rejected." App. 28a, 40a. It affirmed the holding that if UC's "Policies are rationally related to the goal of selecting the most qualified students for admission, they do not violate the First Amendment's guarantee of free speech." App. 70a-71a; *accord* App. 13a, 25a, 64a, 76a, 78a-79a, 101a. What the district court meant by the rational basis standard was that UC's action "may be based on rational speculation unsupported by evidence or empirical data" (as was in fact the case), and "the burden is on the one attacking the [regulation] to negative every conceivable basis which might support it." App. 79a n.20, 70a-71a, 28a. Overall, the Ninth Circuit eviscerated the rule that viewpoint discrimination is prohibited. Instead, the Ninth Circuit allowed content discrimination generally and (contrary to the very cases on which it relied) viewpoint discrimination so long as there is a mere rational basis, whenever the speech discrimination is by a state university system or other "public service." That conflicts with the decisions of this Court and other circuits.

1. The Ninth Circuit's Ruling that Viewpoint Discrimination and Other Freedom of Speech Infringements Are Permissible under a Mere Rational Basis Test When "Government Provides a Public Service That . . . Requires . . . Distinctions Based on the Content of Speech" Conflicts with This Court and the Fourth, Seventh, and Eighth Circuits.

The Ninth Circuit asserted as a general rule that "[t]he Supreme Court has rejected heightened scru-

tiny where, as here, the government provides a public service[8] that, by its nature, requires evaluations of and distinctions based on the content[9] of speech." App. 2a. UC's claim, as stated in its appellate brief (UCB32), is that because it must select among applicants, it

> must have the discretion to evaluate and approve or disapprove the means, content, and viewpoints of academic expression.

However, there is nothing about selecting students for public university admission that requires a university to "approve or disapprove" any "viewpoints"—that is instead classic viewpoint discrimination. And there is nothing about reviewing high school course descriptions for adequate preparation that requires a university to "approve or disapprove" any "viewpoints," nor do any of the other 49 state universities or any private universities claim a need to review high school courses. UC only "requires evaluations of and distinctions based on the content of speech" or of its "content, and viewpoints" because it appointed itself reviewer of private school speech, decreed that not just standard course content but added viewpoints must be evaluated, and deputized

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[8] UC's self-appointed review of public, private, and religious high school courses does not involve subsidy of any schools, much less of their speech. UC's selection among applicant students does not involve any subsidy of their speech, whether or not it involves subsidy of a college education. Neither process is remotely like government selection of speech to subsidize, among artist applicants for grants, among databases to fund in local libraries, or among potential participants in educational television debates.

[9] Of course, when state action is both content-based and viewpoint discriminatory, "viewpoint discrimination is the proper way to interpret" and analyze it. *Rosenberger*, 515 U.S. at 831.

itself as the thought police to ferret out dangerous added religious viewpoints.

The assertion that "[t]he Supreme Court has rejected heightened scrutiny" when "government provides a public service" is equally fallacious, and conflicts directly with this Court's precedent. *Rosenberger* spurned another state university's claim that its selection necessitated viewpoint discrimination:

> [T]he underlying premise that the University could discriminate based on viewpoint if demand for space exceeded its availability is wrong as well. The government cannot justify viewpoint discrimination among private speakers on the economic fact of scarcity.

515 U.S. at 835. *Widmar* rejected another state university's argument that it could conduct content discrimination or viewpoint discrimination in selecting among applicants for university meeting space. It struck down a prohibition on "use of University buildings or grounds 'for purposes of religious worship or religious teaching'" as a violation of freedom of speech, because "content-based exclusion of religious speech... violates the fundamental principle that a state regulation of speech should be content-neutral." *Widmar*, 454 U.S. at 265, 277. *Bakke* similarly rejected UC's claim that its need to evaluate and select students, and its freedoms as a university, allowed it to select on a prohibited basis, the color of their skin, warning UC that "constitutional limitations protecting individual rights may not be disregarded." *Regents of University of California v. Bakke*, 438 U.S. 265, , 314 (1978). *Southworth* insisted that another state university must follow "the standard of viewpoint neutrality" in its selection of student organizations to fund. 529 U.S. at 230, 233.

Analogously, this Court has required, not rejected, strict scrutiny of content-based selection when it involved "a public service," though government often claimed that it may and must make content-based decisions. *E.g., Capitol Square Review & Advisory Board v. Pinette,* 515 U.S. 753, 761 (1995) (providing places for monuments in public plaza); *Widmar,* 454 U.S. at 269-70 (providing university meeting space). If content-based selection does not invoke minimal scrutiny because of "a public service," *a fortiori,* viewpoint-based selection does not invoke minimal scrutiny.

Thus, this Court has never used (or even hinted at) the rational basis test for viewpoint-based selection, as the Ninth Circuit did, and has never even used strict scrutiny, but has instead simply struck down viewpoint discrimination without weighing the state interest or the narrowness of means[10] (such as *Rosenberger, Lamb's Chapel,* and *Good News*). *E.g., Wigg,* 382 F.3d at 814 (8th Cir. 2004); *Mesa,* 197 F.3d at 1047 (10th Cir. 1999).

Similarly, other circuits have never used (or hinted at) the rational basis test for viewpoint-based selection, even when it involved "a public service," placing at least the Fourth, Seventh, and Eighth

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[10] However, UC's policy or practice is not required by a compelling interest and does not employ the least burdensome means. One of many proofs is that "UC does not review courses taken by applicants from out-of-state high schools . . . , which comprise approximately fourteen percent of the applicant pool and about nine percent of admitted students," App. 50a(ER1451,1691), or from foreign high schools, another 3%. (ER1451.)

Circuits in conflict with the Ninth Circuit. *E.g.*, *Child Evangelism*, 470 F.3d at 1067-68 (school facility use); *DeBoer*, 267 F.3d at 568-69, 571-74 (municipal hall use); *Christian Legal Society*, 453 F.3d at 865-67 (campus recognition); *Wigg*, 382 F.3d at 814 (after-school facility use).

2. The Ninth Circuit's Vast Extrapolation of *Finley, American Library,* and *Forbes* and Their Rational Basis Test, from Government Selection among Speech To Subsidize to "Government Provid[ing] a Public Service" and to Regulation of Private Speech, and from Content-Based Decisions to Viewpoint Discrimination, Conflicts with This Court's Decisions.

The Ninth Circuit based its rational basis review of UC's viewpoint discrimination on this Court's decisions in *NEA v. Finley*, 524 U.S. 569 (1998),[11] *United States v. American Library Ass'n*, 539 U.S. 194 (2003) ("*ALA*"), and *AETC v. Forbes*, 523 U.S. 666 (1998).[12] Yet those decisions prohibit viewpoint discrimination, are limited to government selection among speech to subsidize, and do not involve government regulation of private speech.[13] The Ninth Circuit's leap from content-based decisions about

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[11] *Finley* does not support use of rational basis review at all.

[12] *Finley* upheld NEA grant selection based on artistic excellence. *ALA* upheld federal restrictions on its grants to public libraries to avoid use for online pornography. *Forbes* upheld public television selection of only major candidates for televised debates using broadcaster editorial discretion.

[13] Nor does this case involve governmental speech. *Pleasant Grove City v. Summum*, 129 S.Ct.1125,1131, 172 L.Ed.2d 853 (2009).

subsidized speech to viewpoint discrimination in regulating private speech is as breathtaking as it is seriously mistaken.

Those decisions expressly say that viewpoint discrimination is forbidden in any event. *Finley* prohibited "suppression of dangerous ideas," and said its result would differ if the policy "raise[d] concern about the suppression of disfavored viewpoints." 524 U.S. at 587. *ALA* held that "viewpoint-based restrictions are improper 'when the [government] does not itself speak or subsidize transmittal of a message it favors'." 539 U.S. at 213 n.7. *Forbes* held, "To be consistent with the First Amendment, the exclusion of a speaker from a nonpublic forum must not be based on the speaker's viewpoint." 523 U.S. at 682. *Accord, Citizens United*, 130 S.Ct. at 946 (Stevens, J., concurring and dissenting, with Ginsburg, Breyer, and Sotomayor, JJ.). It is an illicit extrapolation for the Ninth Circuit to hold that those cases (only those cases) authorize UC's viewpoint discrimination.

Finley, *ALA*, and *Forbes* only allow content-based decisions in one very limited circumstance—when government selects among speech to subsidize—or as *ALA* described their rule, when government selects "what private speech to make available to the public" with government subsidy. *ALA*, 539 U.S. at 204. It is a huge extrapolation for the Ninth Circuit to hold that those cases generally allow content-based decisions whenever "government provides a public service" and claims a need to select among speech. App. 2a.

Moreover, those decisions expressly state that

they do not apply to regulation of private speech at all, such as that of private schools here. *Finley* warned "the Government may allocate competitive funding according to criteria *that would be impermissible were direct regulation of speech . . . at stake*," 524 U.S. at 587-88 (as it is here), and *Finley* did not regulate any private speech. *ALA* did not "regulate private conduct" at all, but federal government grants to public libraries. 539 U.S. at 203 n.2. *Forbes* did not regulate any private speech, but merely determined whether public television's editorial discretion could select only major candidates for free televised debates. Again the extrapolation was indefensible.

Whatever those decisions mean, they do not declare open season for viewpoint discrimination whenever "government provides a public service" and claims a need to make distinctions based on the content of speech, and they do not apply to regulation of private speech or provide a general license to kill religious viewpoints. The three decisions are a narrow exception from the general rule of strict scrutiny, upholding only those content-based decisions that involve government selection among speech to subsidize or to admit to a nonpublic forum,[14] else they would swallow up the general protection of freedom of speech from content discrimination (and from viewpoint discrimination). The Ninth Circuit's extrapolation of those decisions to viewpoint dis-

[14] This case does not involve a forum (public, designated, limited, or nonpublic), in private religious high school courses or in UC course description review, as the Ninth Circuit and the parties agree. App. 2a. Otherwise, viewpoint discrimination would be forbidden regardless of the category of forum.

crimination, to whenever government provides a public service, and to regulation of private speech finds no support in those decisions or other decisions of this Court.

Rather than extrapolating those three cases, the Ninth Circuit should have applied this Court's viewpoint discrimination cases and its university cases (*Rosenberger*, *Southworth*, *Widmar*, and *Bakke*).

C. The Ninth Circuit's Rulings that Constrictively Reinterpreted Each First Amendment Clause To Uphold, the Association Standing Test To Deny Standing to Raise, and the Overbreadth Doctrine to Ignore, 150 Other UC Course Rejections for Adding a Religious Viewpoint, Conflict with Decisions of This Court and Other Circuits, and Warrant Granting the Petition.

1. The Ninth Circuit Constrictively Reinterpreted Each First Amendment Clause in Upholding UC Rejection of Courses for Adding a Religious Viewpoint, Contrary to Decisions of This Court and Other Circuits.

The Ninth Circuit, and the district court it affirmed, eviscerated each First Amendment provision when it upheld UC's discrimination against religious speech added to standard content in private schools. App. 6a-9a.

The Ninth Circuit misdescribed, and sustained,

the district court holding that added an animus requirement to free speech claims. The district court, in its discussion of the Free Speech Clause, held that "the decision to reject a course is constitutional as long as: (1) UC did not reject the course because of animus; and (2) UC had a rational basis for rejecting the course." App. 25a; *accord* 103a, 64a. It held that "under the Free Speech Clause" as well as under the Free Exercise Clause an "animus requirement is equally applicable" to challenges that "the government is punishing disfavored viewpoints," and upheld UC's actions as "not motivated by animus in setting the A-G Guidelines and Policies." App. 81a, 86a. That conflicts with this Court's determination that "[i]llicit legislative intent is not the *sine qua non* of a violation of the First Amendment" in *City of Cincinnati*, 507 U.S. at 429, and that there is no requirement "of an improper censorial motive" in *Simon & Schuster*, 502 U.S. at 117.

The Ninth Circuit caricatured ACSI's and Calvary's establishment claim, that hostility to religion is flatly prohibited and should not be evaluated using the *Lemon* test, and upheld the district court's ruling that UC's rejection of courses because of an added religious viewpoint did not violate the *Lemon* test. App. 7a-8a, 95a-98a. That conflicts with this Court's statements that hostility toward religion violates the Establishment Clause, with no hint of limiting that to only such hostility as has a wholly nonsecular purpose or a hostile primary effect, in *Van Orden v. Perry*, 545 U.S. 677, 684 (2005) (plurality); *Rosenberger*, 515 U.S. at 845-46; *Mergens*, 496 U.S. at 248; and *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984). "If a State refused to let religious groups use facilities open to others, then it would demonstrate

not neutrality but hostility toward religion." *Mergens*, *id.*

The court below erroneously refused to recognize or protect hybrid free exercise claims, saying it "'declin[ed] to be the first' court to allow... the hybrid-rights doctrine." App. 8a. Thus, it denied strict scrutiny to the claim that UC's rejection of courses with added religious viewpoints violated First Amendment protections for religious association in religious schools, and for religious speech in their curriculum. (ER1350.) That conflicts with this Court—which was "the first Court to allow... the hybrid-rights doctrine"—in *Employment Div. v. Smith*, 494 U.S. 872, 881, 882 (1990). The Ninth Circuit also erroneously refused to apply strict scrutiny to "individualized governmental assessments"—UC's course rejections—that were religiously discriminatory. That conflicts with *Smith*, 494 U.S. at 884, and, as *Smith* interpreted it, *id.* at 884, with *Sherbert v. Verner*, 374 U.S. 398, 402-03 (1963). Finally, the Ninth Circuit erroneously refused to employ strict scrutiny for ACSI's religious discrimination claim brought under *Smith* and *Lukumi*, since "UC's policies were more akin to the civil regulation that was upheld in *Locke v. Davey*, 504 U.S. 712 (2004), than the criminal prohibition that was invalidated in *Church of the Lukumi Babalu Aye*." App. 8a. That conflicts with the strict scrutiny of religious discrimination required by *Smith*, 494 U.S. at 886 n.3, and *Lukumi*, 508 U.S. 520, 546-47 (1993).

Finally, the Ninth Circuit erroneously "applied rational basis scrutiny to the plaintiffs' equal protection claim," on the basis that, despite UC rejection of courses with added religious viewpoints, there was

no "evidence that UC discriminates on the basis of religion," because "UC's course approval policy is the same for all in-state applicants, regardless of religion," and "whether a course is college preparatory is not a suspect classification." App. 8a-9a. However, UC's course approval policy is *not* the same for all added viewpoints (secular ones are nondisqualifying, religious ones are disqualifying), and UC's rejection of courses with religious viewpoints *does* involve a suspect classification (religion). The decision conflicts with the rule that "we strictly scrutinize governmental classifications based on religion." *Employment Division*, 494 U.S. at 886 n.3; *accord Lukumi*, 508 U.S. at 546.

2. The Ninth Circuit Constrictively Reinterpreted the Association Standing Test in Holding that the Nation's Largest Religious School Association Cannot Represent Its Members' As-Applied Claims, Contrary to Decisions of This Court, the Third Circuit (Then-Judge Alito), and the First and Seventh Circuits.

The Ninth Circuit refused to consider 34 of 38 rejected courses from ACSI member schools by rejecting ACSI's associational standing to bring as-applied challenges. App. 5a (ER118-24, 1981-2130). Those courses, in the subjects of history/government, English, biology, and religion, were part of the nearly 150 UC rejections of religious school courses because a religious viewpoint was added—not of any lack of standard content. App. 103a (ER443-86, 750-77).

The Ninth Circuit did so by gutting the association standing test of this Court and other circuits to

deny a national association standing to raise as-applied viewpoint discrimination claims "representing [its] more than 800 religious schools in California" (ER1296) against the state university system. App. 5a-6a. It reinterpreted the third prong of the associational standing test in *Hunt*, which requires that "neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977). The Ninth Circuit ruled that "ACSI cannot satisfy the third prong" of *Hunt* because "plaintiffs' as-applied claims and the relief they seek, although equitable in nature, both require 'individualized proof specific to each rejected course and the school that offered it." App. 5a.

The Ninth Circuit's reinterpretation of *Hunt*'s third prong conflicts with the First, Third, and Seventh Circuits, which hold (in the words of then-Judge Alito) that standing is not barred even if it "requires participation of *some* members" as parties, because *Hunt*'s prong allows association standing (quoting *Warth*) "so long as the nature of the claim and of the relief sought does not make the individual participation of *each injured party indispensable*." *Hospital Council v. City of Pittsburgh*, 949 F.2d 83, 89 (3d Cir. 1991) (emphasis in original). The Seventh Circuit expressly adopted then-Judge Alito's interpretation. *Retired Chicago Police Ass'n v. City of Chicago*, 7 F.3d 584, 601-02 (7th Cir. 1993). The First Circuit similarly held that "just because a claim may require proof specific to individual members of an association does not mean the members are required to participate *as parties*" in violation of *Hunt*'s prong. *Playboy Ent. v. PSC*, 906 F.2d 25, 35 (1st Cir. 1990).

Other circuits that have addressed the issue conflict with the Ninth Circuit's reinterpretation, and would allow ACSI standing, particularly as here where an association is ideally suited to bring claims because each school's course description and UC's rejection were in UC's own documents. (*E.g.*, ER1981-2204.)

The Ninth Circuit's reinterpretation also erases the welcome bright line, that association standing is consistently allowed for injunctive and declaratory claims (like ACSI's claims), but is consistently denied for damages claims. *Hunt*, 432 U.S. at 343; *Warth v. Seldin*, 422 U.S. 490, 511, 515 (1975). Effectively, the Ninth Circuit would have precluded the association in *Hunt* from bringing its as-applied claims. 432 U.S. at 340-41.

3. The Ninth Circuit Constrictively Reinterpreted the Overbreadth Doctrine in Refusing To Consider the Practice of Nearly 150 Other UC Course Rejections for Adding a Religious Viewpoint (in Catholic, Jewish, and Protestant Schools), Contrary to Decisions of This Court and Other Circuits.

The Ninth Circuit reinterpreted the overbreadth doctrine, by refusing to consider the acknowledged "150 courses rejected by UC," App. 9a-10a, and thus claimed ACSI had "not alleged facts showing any risk that UC's policy will lead to the suppression of speech," and had not shown "that UC has a well established practice of rejecting courses with standard content solely because they add a religious viewpoint." App. 3a,4a.[15] The appellate court did so by

[15] Yet UC had conceded the wrongful refusal to use the

creating a barrier before overbreadth is considered, requiring that plaintiffs must first "'provide an analysis as to why any of the more than 150 courses rejected by UC should have been approved.'" App. 10a. However, the question is whether UC rejected courses for unconstitutional stated reasons, not whether those courses each qualified otherwise for approval.[16] The determinant for whether state action "may be invalidated as overbroad [is] if 'a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep.' *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449, n.6 (2008)." *United States v. Stevens*, 130 S.Ct. 1577. 1587 (2010). The express policy or practice of rejecting courses because of added religious viewpoints, and the nearly 150 courses rejected on that basis, both show "a substantial number of applications" that are unconstitutional. The Ninth Circuit wrongly refused to consider the 150 courses, because of its new barrier that plaintiffs first show each unconstitutional instance would otherwise have succeeded. *E.g.*, *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 129-30 (1992).

The Ninth Circuit ended, after refusing to consider the 150 courses, by contending that "plaintiffs failed to provide any evidence of punishment, or even a chilling effect." App. 10a. The district court conceded that, if the 150 courses were considered and showed a policy of rejecting courses with an

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overbreadth doctrine by not responding in its appellate brief.

[16] ACSI *did* provide an analysis as to how each of the nearly 150 courses including the 5 Calvary courses was rejected for unconstitutional reasons. ER443-86,750-77,118-24,126-34,233-51,285-97,323-48,360-81.

added religious viewpoint, that policy "would likely cause Defendants to incorrectly reject a large number of courses that meet UC's academic standards." App. 87a. This Court's rule is that "the very existence of some broadly written laws has the potential to chill the expressive activity of others not before the court," and too broad a sweep "penaliz[es] a substantial amount of speech that is constitutionally protected." *Forsyth County*, 505 U.S.at 129-30. The overbreadth doctrine should have been employed, not refused.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS,
NINTH CIRCUIT.

No. 08-56320

ASSOCIATION OF CHRISTIAN SCHOOLS INTERNATIONAL, ET AL., v. ROMAN STEARNS, ET AL.,

Jan. 12, 2010.

[2]Before HALL, THOMPSON and SILVERMAN, Circuit Judges.

MEMORANDUM*

*1 The plaintiffs are the Association of Christian Schools International ("ACSI"), Calvary Chapel Christian School ("Calvary"), and five Calvary students (collectively, "the plaintiffs"). They allege that the University of California ("UC") admission policy, which involves UC's review and approval of high school courses in order to qualify applicants for UC admission, is unconstitutional under the Free Speech, Free Exercise, Establishment, and Equal Protection Clauses. The defendants, Roman Stearns, Susan Wilbur, Robert Dynes, Mark Rashid, and Judy Sakaki (collectively, "the defendants"), are the UC employees responsible for [3]developing and implementing the course approval policy. The district court determined that UC's policy was

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* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

constitutional on its face and as-applied and granted summary judgment in favor of the defendants on all claims. We have jurisdiction under 28 U.S.C. § 1291 and we affirm.

I. The Level of Judicial Scrutiny

The Supreme Court has rejected heightened scrutiny where, as here, the government provides a public service that, by its nature, requires evaluations of and distinctions based on the content of speech. *See United States v. American Library Ass'n, Inc.*, 539 U.S. 194, 203-208 (2003) ("ALA"); *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 580-87 (1998); *Arkansas Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 673-74 (1998). As a university, one of UC's "essential freedoms" is to "determine for itself on academic grounds ... who may be admitted to study." *Sweezy v. State of N.H. by Wyman*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring). UC exercises that freedom by reviewing high school courses to ensure that they adequately prepare incoming students for the rigors of academic study at UC.

The plaintiffs' reliance on forum cases which apply heightened scrutiny is misplaced. See Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819 (1995); *Widmar v. Vincent*, 454 U.S. 263 (1981); *Bd. of Regents of Univ. of* [4]*Wisconsin System v. Southworth*, 529 U.S. 217 (2000). The plaintiffs concede that this case does not involve a forum. Nor does this case present a "close analogy" to forum cases as in *Southworth*. Here, UC evaluates high school courses to ensure they are college

preparatory, not to facilitate "the free and open exchange of ideas by, and among, its students." *Southworth*, 529 U.S. at 229-30. The forum cases are simply inapposite. *See ALA*, 539 U.S. at 206-07 (distinguishing *Rosenberger* because a "public library does not acquire Internet terminals in order to create a public forum for Web publishers to express themselves."); *Finley*, 524 U.S. at 586 ("The NEA's mandate is to make esthetic judgments, and the inherently content-based 'excellence' threshold for NEA support sets it apart from the subsidy at issue in *Rosenberger* ....").

II. The Plaintiffs' Facial Challenge

The plaintiffs have not alleged facts showing any risk that UC's policy will lead to the suppression of speech. *Finley*, 524 U.S. at 580 (To prevail on a facial challenge, a plaintiff "must demonstrate a substantial risk that application of the provision will lead to the suppression of speech"). Nor can they. It is undisputed that UC's policy does not prohibit or otherwise prevent high schools, including Calvary, from teaching whatever and however they choose or students from taking any course they wish. High schools can, and do, continue to teach courses even [5]when they are denied UC approval. UC does not punish a school for teaching, or a student for taking, an unapproved course. *Cf. R.A. V. v. City of St. Paul*, 505 U.S. 377, 391, 393 (1992) (invalidating an ordinance that set forth a clear penalty, proscribed views on particular disfavored subjects and suppressed distinctive ideas conveyed by a distinctive message).

*2 The plaintiffs devote much of their appeal to arguing that UC's policy on religion and ethics courses constitutes viewpoint discrimination. This policy provides that in order to receive UC approval, religion and ethics courses should "treat the study of religion or ethics from the standpoint of scholarly inquiry, rather than in a manner limited to one denomination or viewpoint." Aside from pointing out that UC's policy includes the word "viewpoint," the plaintiffs fail to allege facts showing that this policy is discriminatory in any way. It is not. As UC's expert explained, UC's policy is necessary because the "academic study of religion is multidisciplinary in nature" and "[p]rivileging one tradition or point of view is considered unacceptable and counter-productive in the scholarly study of religion at UC and similar colleges and universities."

Going beyond UC's written policies, the plaintiffs contend that UC has a well established practice of rejecting courses with standard content solely because they add a religious viewpoint. *See, e.g., Santa Monica Food Not Bombs v. City of* [6]*Santa Monica*, 450 F.3d 1022, 1035 (9th Cir.2006) (in a facial challenge, the court commonly considers the government's "authoritative interpretation of its guidelines" if it is a "well-established practice"). The evidence, however, is to the contrary. It is undisputed that UC has approved courses with religious content and viewpoints as well as courses that used religious textbooks as the primary and secondary course texts.

III. The Plaintiffs' As-Applied Challenge

As an initial matter, the district court correctly concluded that ACSI lacks associational standing to assert as-applied claims on behalf of its member schools that are not parties to this lawsuit.[1] ACSI cannot satisfy the third prong of the Supreme Court's associational standing test, which mandates that "neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977). The plaintiffs' as-applied claims and the relief they seek, although equitable in nature, both require "individualized proof" specific to [7]each rejected course and the school that offered it. *Hunt*, 432 U.S. at 343; *Warth v. Seldin*, 422 U.S. 490, 515-16 (1975).[2]

Because ACSI lacks associational standing to bring as-applied claims on behalf of non-party member schools, the plaintiffs' as-applied challenge is limited to the four Calvary courses that were denied UC approval. The district court correctly determined that UC's rejections of the Calvary courses were reasonable and did not constitute

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[1] The plaintiffs do not contend that ASCI has associational standing to assert claims on behalf of non-ASCI member schools which had courses rejected by UC, including the Catholic and Jewish school courses the plaintiffs and amici repeatedly discuss in their briefs.

[2] Because we conclude that ACSI lacks associational standing, we need not address the district court's additional decision that the plaintiffs waived as-applied challenges for non-Calvary courses that were not timely disclosed. The plaintiffs lack standing to assert as-applied claims based on non-Calvary courses regardless of whether they were timely disclosed.

viewpoint discrimination. The plaintiffs offer no facts or evidence to disturb this conclusion. UC's rejection letters and internal meeting notes demonstrate that UC denied approval not because the courses added a religious viewpoint, but because they were either not college preparatory, lacked necessary course information or materials, or had other procedural defects which Calvary never bothered to cure.

*3 Alternatively, the plaintiffs contend that issues of fact exist with respect to their as-applied challenge which preclude summary judgment. The plaintiffs, however, have forfeited this argument. Instead of identifying the factual issues and asserting arguments as to why they were material, the plaintiffs merely provide a [8]table of citations to various declarations, affidavits, exhibits and depositions relating to each rejected course, leaving this court to "piece together" their argument. *Independent Towers of Washington v. Washington*, 350 F.3d 925, 929 (9th Cir.2003) (holding that the plaintiff forfeited its preemption claims on appeal where it provided a "five page laundry list of the challenged regulations and their titles, leaving the court to piece together the argument for preemption as to each regulation"). The district court properly rejected the plaintiffs' as-applied challenge.

IV. The Plaintiffs' Additional Arguments

The plaintiffs assert a myriad of legal arguments attacking the district court's decision, all of which lack merit. We address each in turn.

A. Animus

The plaintiffs contend that the district court erred by requiring them to show evidence of animus in order to succeed on their claims under the Free Speech and Establishment Clauses. The district court, however, did not require animus under the Establishment Clause. Nor did it require animus under the Free Speech Clause as the plaintiffs contend; instead, it held that a showing of animus could render an otherwise reasonable policy unconstitutional. *See Finley*, 524 U.S. at 587.

[9]B. The "Unbridled Discretion" Doctrine

Next, the plaintiffs argue that the district court erred by limiting the unbridled discretion doctrine to licensing and prior restraint cases. We need not, however, resolve the scope of this doctrine. *See Ward v. Rock Against Racism*, 491 U.S. 781, 793 (1989) (noting that the scope of the doctrine is "far from clear"). We affirm the district court's decision based on its alternative holding that, assuming the doctrine applies, UC provides sufficient guidance for course review to defeat a challenge of unbridled discretion.

C. The "Primary Effect" Prong of the *Lemon* Test

The plaintiffs mistakenly argue that the district court erred by inventing a "primary effect" standard under the Establishment Clause. The district court did not invent the "primary effect" language. The Supreme Court used that language in *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971). As we have explained, the "second prong of *Lemon* bars

governmental action that has the 'principal or primary effect' of advancing or disapproving of religion." *Vasquez v. Los Angeles County*, 487 F.3d 1246, 1256 (9th Cir.2007) (quoting Lemon, 403 U.S. at 612).

D. The "Hybrid-Rights" Doctrine

[10]The plaintiffs contend that the district court erred by not applying strict scrutiny to their free exercise claim under the so-called hybrid-rights doctrine. Yet the plaintiffs offer no reason to depart from our recent decision in *Jacobs v. Clark County Sch. Dist.*, 526 F.3d 419, 440 n. 45 (9th Cir.2008) where we "declin[ed] to be the first" court to allow a "plaintiff to bootstrap a free exercise claim" using the hybrid-rights doctrine. *Id.*

*4 The plaintiffs' contention that the district court misread *Sherbert v. Verner*, 374 U.S. 398 (1963) in its discussion of the Free Exercise Clause is irrelevant. The plaintiffs do not and cannot challenge the crux of the district court's rejection of their free exercise claim-that UC's policies were more akin to the civil regulation that was upheld in *Locke v. Davey*, 540 U.S. 712 (2004) than the criminal prohibition that was invalidated in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993).

E. The Equal Protection Clause

The district court properly applied rational basis scrutiny to the plaintiffs' equal protection claim. *See Locke*, 540 U.S. at 721 n. 3 ("Because we hold ... that

the program is not a violation of the Free Exercise Clause, however, we apply rational-basis scrutiny to his equal protection claims.") (citations omitted). The plaintiffs nevertheless argue that strict scrutiny applies because religion is a suspect [11]class. Courts, however, only apply strict scrutiny when distinctions are made on the basis of a suspect class, like religion. *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985); *Ball v. Massanari*, 254 F.3d 817, 823 (9th Cir.2001).

The record is devoid of any evidence showing that UC discriminates on the basis of religion. UC's course approval policy is the same for all in-state applicants, regardless of religion. The plaintiffs do not contend that any student has been denied UC admission based on the student's religion. Nor do they contend that any student has been denied eligibility based on UC's rejection of a high school course. UC's policy and its individual course decisions are not based on religion, but on whether a high school course is college preparatory. As the defendants point out, whether a course is college preparatory is not a suspect classification; therefore, the Equal Protection Clause requires only that UC's distinctions be rational.

F. The 150 Rejected Courses and the "Overbreadth" Doctrine

The plaintiffs argue that the district court erred by "entirely ignoring" evidence that UC rejected over 150 courses from religious high schools (the majority of which are not plaintiffs in this case) and by refusing to apply the overbreadth doctrine. To the

contrary, the district court expressly recognized the [12]laundry list of 150 rejected courses proffered by the plaintiffs and concluded it was irrelevant because the plaintiffs did "not provide an analysis as to why any of the more than 150 courses rejected by UC should have been approved."

That the district court did not specifically address the rejected courses in its analysis of the overbreadth doctrine does not constitute error. The plaintiffs' list of 150 rejected courses, without any supporting analysis, does not raise a genuine issue of material fact with respect to whether UC's policy "punishes a 'substantial' amount of protected free speech" in violation of the overbreadth doctrine. *Virginia v. Hicks*, 539 U.S. 113, 118-19 (2003). The plaintiffs failed to provide any evidence of punishment, or even a chilling effect, because high schools are free to continue teaching the courses even if UC denies approval.

G. The Plaintiffs' Additional Expert Affidavits

*5 The plaintiffs contend, without support, that the district court erred in excluding "certain opinions" in its additional expert affidavits. The plaintiffs do not specify which opinions in the affidavits were improperly excluded, nor do they explain why the exclusions were erroneous, and have therefore failed to preserve this argument. *See Greenwood v. Fed. Aviation Admin.*, 28 F.3d 971, 977 (9th Cir.1994) ("We review only issues which are argued specifically and distinctly in a party's opening brief.... We will not manufacture arguments for an appellant, [13]and a bare assertion does not

preserve a claim, particularly when, as here, a host of other issues are presented for review.").

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT,
CENTRAL DISTRICT OF CALIFORNIA.

No. CV 05-6242 SJO (MANx)

ASSOCIATION OF CHRISTIAN SCHOOLS INTERNATIONAL, ET AL., v. ROMAN STEARNS, ET AL.,

Aug. 8, 2008

ORDER GRANTING DEFENDANTS' "MOTION FOR SUMMARY JUDGMENT ON PLAINTIFFS' AS-APPLIED CLAIMS" [Docket No. 172]

S. JAMES OTERO, District Judge.

This matter is before the Court on Defendants' "Motion for Summary Judgment on Plaintiffs' As-Applied Claims," filed May 28, 2008, --- F.Supp.2d ---- -. Plaintiffs filed an Opposition, to which Defendants replied. The Court heard oral argument from the parties on July 18, 2008. (Docket No. 221.) Because Plaintiffs fail to raise a genuine issue of material fact in support of their "as-applied" claims, Defendants' Motion is GRANTED.

I. *BACKGROUND*

Plaintiffs-Calvary Chapel Christian School ("Calvary"), five Calvary students, and the Association of Christian Schools International ("ACSI")-brought suit against Defendants-several University of California ("UC") employees-for

developing and implementing an admissions process that allegedly violates the Free Speech Clause, the Free Exercise Clause, the Establishment Clause, and the Equal Protection Clause.

[2]UC admits most California applicants based on achievement in high school courses and standardized tests. However, UC only considers courses that it has approved to ensure that admitted students took courses that provided those students with the knowledge and skills to succeed in their studies at UC.[1]

The focus of Plaintiffs' suit is the method by which UC approves high school *983 courses. Plaintiffs allege that this method is unconstitutional on its face and as applied to specific courses.

Earlier this year, the Court ruled on one round of summary judgment motions brought by the parties. In those motions, Defendants requested summary judgment only on Plaintiffs' facial claims, while Plaintiffs requested summary judgment on all of their claims-both facial and as-applied. After determining that Defendants' policies and actions are subject to rational basis review, the Court granted summary judgment in favor of Defendants on Plaintiffs' facial claims. Plaintiffs' request for summary judgment was denied in its entirety, leaving Plaintiffs' as-applied claims remaining for adjudication. Upon the parties' request, the Court

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[1] This Court's "Order Denying Plaintiffs' Motion for Summary Judgment and Granting Defendants' Motion for Partial Summary Judgment" (the "Prior Order") describes the UC admissions process in greater detail. (Prior Order 1-4.)

granted Defendants leave to file a second summary judgment motion concerning Plaintiffs' as-applied claims.

Now, Defendants move for summary judgment on Plaintiffs' as-applied claims.

II. *DISCUSSION*

Summary judgment is proper only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material act and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). A "material" fact is one that could affect the outcome of the case, and an issue of material fact is "genuine" if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

[3]Plaintiffs identify 38 courses [2] proposed by religious schools and rejected by UC that Plaintiffs believe were unconstitutionally denied approval. Defendants argue that they are entitled to summary judgment for numerous procedural and substantive reasons.

A. *Defendants' Procedural Arguments*

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[2] Plaintiffs originally filed a list of 41 challenged course decisions (Docket No. 167), but withdrew three of those challenges (Docket No. 192).

Defendants offer several reasons why they are entitled to summary judgment as to most of the course rejections without addressing the merits of Plaintiffs' as-applied claims: (1) Plaintiffs do not have standing to challenge UC's decision to reject courses offered by schools other than Calvary; (2) Plaintiffs failed to raise most of their as-applied claims in a timely manner; and (3) Plaintiffs failed to timely disclose expert conclusions regarding individual course decisions.[3]

1. *Standing for Non-Calvary Course Decisions*

Defendants contend that Plaintiffs do not have standing to pursue their claims regarding UC's rejection of courses taught at schools other than Calvary. (MSJ 8.) ACSI, an organization of Christian schools, claims that it has associational standing to pursue as-applied claims on behalf of its member schools that had courses rejected.

Associational standing permits an organization to litigate as a representative of its members if: "(a) [the organization's] members would otherwise have standing to sue in their own right; (b) the interests [the organization] seeks to protect are germane***984** to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the

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[3] Defendants also argue: (1) Plaintiffs do not have standing for prospective injunctive relief; (2) Plaintiffs' challenges regarding seven of the course decisions are barred by the statute of limitations; and (3) Plaintiffs' expert opinions are given by individuals addressing subject matter outside their field of expertise. The Court does not address these issues.

participation of individual members in the lawsuit." *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977).

Defendants concede that ACSI satisfies prongs (a) and (b) of the *Hunt* test, arguing only that ACSI does not satisfy prong (c) because the claims asserted and the relief requested require the participation of individual members. Plaintiffs counter that its claims and relief do not require the participation of individual members and, even if they did, Defendants waived their objection.

[4]a. *Defendants Did Not Waive Their Standing Objection.*

Generally, standing cannot be waived if based on constitutional requirements imposed by Article III. *See United Food & Commercial Workers Union Local 751 v. Brown Group, Inc.*, 517 U.S. 544, 551 (1996). Constitutional standing requires at a minimum: "(1) an injury in fact[;] (2) a causal relationship between the injury and the challenged conduct[;] and (3) a likelihood that the injury will be redressed by a favorable decision." *Id.*

However, federal courts also impose judicially created "prudential" standing requirements that further limit their jurisdiction. *Id.* Prudential elements of standing, unlike the constitutional requirements, can be waived if they are "not properly raised before the district court." *Pershing Park Villas Homeowners Ass'n v. United Pac. Ins. Co.*, 219 F.3d 895, 900 (9th Cir.2000).

The third prong of the associational standing test is prudential. *United Food*, 517 U.S. at 555-57 ("Resort to general principles, however, leads us to say that the associational standing test's third prong is a prudential one.").[4] Accordingly, a standing challenge based on this prong may be waived if it is not timely asserted or "if the time and manner" is merely "strategic." See *Pershing Park*, 219 F.3d at 900.[5]

Although Defendants did not object to associational standing until this recent Motion for Summary Judgment, that objection is timely raised in light of the circumstances of this case. Until this Motion, Plaintiffs had not identified any as-applied

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[4] The first two *Hunt* prongs "address[ ] the Article III requirements" for standing and cannot be waived. *United Food*, 517 U.S. at 555.

[5] Defendants argue that "the Ninth Circuit has not treated *Hunt's* third prong as waivable, instead reviewing challenges to associational standing ... even when standing had not been raised in the district court." (Reply 6 (citing *Associated Gen. Contractors of Cal., Inc. v. Coal. for Econ. Equity*, 950 F.2d 1401, 1405 (9th Cir.1991) (analyzing associational standing as a form of constitutional standing, which cannot be waived)).) Since the Ninth Circuit's decision in *Associated General Contractors*, the Supreme Court ruled in *United Food* that *Hunt's* third prong is prudential and therefore may be waived. "[W]here intervening Supreme Court authority is clearly irreconcilable with our prior circuit authority[,] ... district courts should consider themselves bound by the intervening higher authority and reject the prior opinion of this court as having been effectively overruled." *Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir.2003). Even if *Associated General Contractors* supports Defendants' assertion that associational standing cannot be waived, it has been effectively overruled by *United Food*.

challenges to non-Calvary courses.

[5]Accordingly, Defendants may challenge ACSI's associational standing.

b. *ACSI Does Not Have Associational Standing.*

Whether an organization satisfies the third *Hunt* prong depends on the claims it ***985** asserts and the relief it requests. The more specific claims and relief are to individual organization members, the less likely it is that the organization has standing. Courts are likely to grant associational standing where "the [l]aw does not require the participation of individual [association] members, [because] there is complete identity between the interests of the consortium and those of its member[s] ... and the necessary proof could be presented 'in a group context.' " *N.Y. State Club Ass'n, Inc. v. City of New York*, 487 U.S. 1, 10 n. 4 (1988) (quoting *Hunt*, 432 U.S. at 344). Similarly, associational standing is often granted where the challenge raises a pure question of law that is not specific to individual members. *See Playboy Enters., Inc. v. Pub. Serv. Comm'n of P.R.*, 906 F.2d 25, 35 (1st. Cir.1990) (citing *Auto. Workers v. Brock*, 477 U.S. 274, 286 (1986)).

Both parties propose general rules in support of their positions. Plaintiffs argue that an organization generally holds associational standing if it brings suit for declaratory relief. (Opp'n 5 (" *Hunt* itself says (unanimously) that it is met by an association's constitutional claims in a declaratory and injunctive suit (such as this)....").) Defendants argue that an organization generally does not hold associational

standing if it brings an as-applied challenge. (MSJ 10 ("Courts in the Ninth Circuit have repeatedly held that organizations lack associational standing to bring as-applied constitutional claims, as opposed to facial claims.").)

Here, Plaintiffs seek declaratory relief on their as-applied claims. This challenge seemingly falls into both of the parties' general categories, leaving ACSI with and without standing. However, further inquiry into the claims asserted and relief requested reveals that ACSI does not have standing.

First, Plaintiffs' claim for declaratory relief is individualized. As an initial matter, Plaintiffs do not make clear what specific declaratory relief they seek regarding their as-applied claims. Defendants suggest that Plaintiffs seek an order that Defendants must reconsider (or perhaps approve) specific proposed courses. (MSJ 13.) Plaintiffs do not rebut this assertion.

[6]This individualized declaratory relief does not fit the mold of injunctive relief that Plaintiffs argue has been approved by the Supreme Court. Relying on *Hunt*, Plaintiffs argue that declaratory relief begets standing because " 'neither the interstate commerce claim nor the request for declaratory and injunctive relief requires individualized proof and both are thus properly resolved in a group context.' " (Opp'n 5 (quoting *Hunt*, 432 U.S. at 344.) Yet, the individualized nature of each course rejection inhibits any resolution "in a group context."

Plaintiffs' other Supreme Court quotation also

demonstrates why ACSI does not have associational standing. "[A]ssociational standing does not exist for damages suits because 'damages claims are not common to the entire membership, nor shared by all in equal degree'...." (Opp'n 5 (quoting *Warth v. Seldin*, 422 U.S. 490, 515 (1975)).) This reasoning applies equally to Plaintiffs' as-applied challenges. Individual course decisions "are not common to the entire membership." Relief would not be "shared by all in equal degree." Instead, each course decision affects only one ACSI school, and relief would benefit only that school.

Second, "the relief sought is only half the story." *Rent Stabilization Ass'n of City of N.Y. v. Dinkins*, 5 F.3d 591, 596 (2d Cir.1993). Even if Plaintiffs' individualized declaratory relief request did not prohibit associational standing, the individualized***986** nature of Plaintiffs' as-applied claims would bar standing. When the claims require an "ad hoc factual inquiry" for each member represented by the association, the organization does not have associational standing. *See Dinkins*, 5 F.3d at 596 (2d Cir.1993). For example, in *Rent Stabilization Ass'n*, an association representing landlords claimed that some of its members suffered takings as a result of the government's rent stabilization scheme. *Id.* at 592-93. This association sought declaratory relief. *Id.* at 596. Yet, the court denied associational standing because it "would have [had] to engage in an ad hoc factual inquiry for each landlord who allege[d] that he ha[d] suffered a taking" to determine whether a taking had occurred. *Id.*

Plaintiffs contend that the Ninth Circuit has allowed associational standing for as-applied challenges. However, the cases Plaintiffs cite in support of this proposition are distinguishable from the circumstances of this case. *See, e.g., Alaska Fish & Wildlife Fed'n & Outdoor Council,* [7]*Inc. v. Dunkle,* 829 F.2d 933, 937-38 (9th Cir.1987) (finding associational standing where members sought declaratory relief that two government agreements affecting all of Alaska were void).

Accordingly, ASCI does not have associational standing to pursue as-applied claims based on individual course rejections.

2. *Plaintiffs' Recently Disclosed As-Applied Claims and Evidence.*

Defendants also argue that they have been unfairly surprised because Plaintiffs did not raise most of their as-applied challenges until May 1, 2008 and failed to disclose nearly all of the expert opinions they rely on in their Opposition until June 18, 2008.

a. *Plaintiffs' Recently Disclosed Claims*

Defendants object that Plaintiffs failed to identify the specific course decisions that are the subject of their as-applied claims until May 1, 2008. Plaintiffs argue that they revealed the specific courses they seek to challenge through their Complaint, discovery, and prior motion for summary judgment.

First, Plaintiffs' Complaint only specifically

identifies courses proposed by Calvary. Second, Defendants served Plaintiffs with an interrogatory specifically asking Plaintiffs "to identify all courses at any ASCI-affiliated school for which Plaintiffs contend [course] approval was improperly refused." (Friedland Decl. Ex. 10.) Plaintiffs responded that "ACSI is aware of various courses at [Calvary] being rejected by UC, is aware of biology and history courses of Grace Baptist Schools of Redding, Cal. being rejected, is aware of biology courses of Calvary Baptist Schools of LaVerne, Cal. being rejected, and has heard of various other biology and physics courses being rejected by UC." (Friedland Decl. Ex. 10.) Plaintiffs failed to update or supplement this response.

In addition, Plaintiffs brought a motion for summary judgment on their facial and as-applied claims. Yet, Plaintiffs did not identify the specific courses it was challenging. Plaintiffs provided no argument on their as-applied claims, focusing only on their facial claims. Although Plaintiffs referred to a declaration containing a list of hundreds of courses, most of these courses were submitted by non-ACSI schools and the declaration did not purport to bring as-applied challenges to these courses. (Watters Decl. Apps. A-C.)

[8]Plaintiffs failed to disclose which non-Calvary courses they sought to challenge "as-applied." Although Defendants have always known which ACSI schools' courses UC had rejected, Defendants did not know which courses Plaintiffs sought to litigate. Defendants rejected more than 175 courses proposed by ACSI schools *987 during the relevant

time period. At no point, did Plaintiffs specify which of these 175 courses it would challenge through as-applied claims.

To hold that Defendants' knowledge of which courses were rejected is sufficient notice as to Plaintiffs' as-applied claims would have forced Defendants to prepare to defend every single rejection of an ACSI school's course. Defendants' experts would have had to evaluate 175 course descriptions in anticipation of trial.

Accordingly, Plaintiffs waived their as-applied claims as to courses not specifically identified.

b. *Plaintiffs' Recently Disclosed Expert Conclusions*

Defendants object that Plaintiffs present new expert testimony in support of their claims. Plaintiffs identified their as-applied challenges on May 1, 2008, and then asked their experts to provide opinions on the reasonableness of those course rejections. The newly acquired expert affidavits, in which the experts analyze each of Plaintiffs' 38 challenged course rejections, were signed by the experts on June 12, 2008 (Vitz), June 12, 2008 (Stotsky), June 9, 2008 (Behe), and June 13, 2008 (Guevara).

The discovery deadline passed on July 15, 2007. Federal Rule of Civil Procedure 26(a)(2)(C) required all expert discovery to be complete at least by August 21, 2007, 90 days before the trial date. (Docket No. 48.) One month after this expert discovery deadline passed, this Court continued the trial date

indefinitely in light of the massive volume of filings and issues presented by the first round of summary judgment motions. (Docket No. 145.) This continuance did not revive the discovery period for experts.

Nearly all of the relevant opinions in Plaintiffs' recently obtained expert affidavits were not disclosed in those experts' reports. Expert reports must contain "a complete statement of all opinions the witness will express and the basis and reasons for them" and the "data or other information considered by the witness in forming them." Fed.R.Civ.P. 26(a)(2)(B)(I)-(ii).

[9]Under Rule 37(c)(1), opinions not included in expert reports must be excluded unless the lack of disclosure was "substantially justified" or "harmless." Plaintiffs make no argument that their failure to disclose these opinions was justified. At oral argument, Plaintiffs conceded that they did not prepare for the as-applied challenges because they did not expect the Court to reach those claims. (Tr. of July 18, 2008 MSJ Hearing 17 ("Had the Court ruled that there were [discriminatory] policies, and that they were unconstitutional, the Court would never have had reason to get to particular courses."), 18 ("[F]rom our standpoint, the time for doing so had not come and would not come if your Honor ruled in our favor on our motion for summary judgment [as to our facial] claims.").)

Clearly, Defendants are prejudiced as they are unable to have their experts rebut the opinions of the Plaintiffs' experts. The sanction of exclusion is "a

self-executing, automatic sanction to provide a strong inducement for disclosure of material" and "gives teeth to [the Rule 26 disclosure] requirements...." *Yeti by Molly, Ltd. v. Deckers Outdoor Corp.*, 259 F.3d 1101, 1106 (9th Cir.2001) (internal quotation marks omitted).

Accordingly, Plaintiffs' recently acquired expert opinions will be excluded.

B. *Defendants' Substantive Arguments*

Remaining are Plaintiffs' as-applied challenges to four rejected Calvary courses and a Biology course identified in Plaintiffs' interrogatory response. Plaintiffs argue***988** that Defendants' decisions to deny approval for these courses violate the Free Speech Clause, Free Exercise Clause, Establishment Clause, and Equal Protection Clause. Each clause is addressed in turn.

1. *Free Speech Clause*

Plaintiffs primarily argue that Defendants engaged in viewpoint discrimination and content regulation prohibited by the Free Speech Clause. As discussed in the Prior Order, Defendants necessarily facilitate some viewpoints over others in judging the excellence of those students applying to UC. Therefore, the decision to reject a course is constitutional as long as: (1) UC did not reject the course because of animus; and (2) UC had a rational basis for rejecting the course.

[10]a. *Animus*

Defendants argue that Plaintiffs waived any animus argument when Plaintiffs' counsel stated "We do not intend to argue the case based on proving animus" at the hearing on the parties' first round of summary judgment motions. (Tr. of Feb. 14, 2008 MSJ Hearing 39.) Plaintiffs dispute this argument, explaining that they did not intend to argue animus until this Court used that term to describe the punishment of disfavored viewpoints prohibited by *National Endowment for the Arts v. Finley*, 524 U.S. 569, 587 (1998).

Regardless of whether Plaintiffs waived this issue, they fail to present evidence of animus sufficient to raise a genuine issue of material fact. The prototypical example of government animus is found in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993).[6] There, the city council passed an ordinance prohibiting some, but not all, forms of animal killing so that members of the Santeria religion could not sacrifice animals during their worship ceremonies at a local church. "[T]he record ... compel[led] the conclusion that suppression of the central element of the Santeria worship service was the object of the [city] ordinance," *id.* at 534, in part because of comments made at a city meeting at which the issue was addressed.

One councilman said that Santeria devotees "are

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[6] In a subsequent case, the Supreme Court characterized the animus in *Lukumi* as "manifest." *Locke v. Davey*, 540 U.S. 712, 724 (2004).

in violation of everything this country stands for" and another asked "[w]hat can we do to prevent the Church from opening?" *Id.* at 541. A city official told the city council that Santeria was a sin, "foolishness," "an abomination to the Lord," and the worship of "demons" and urged the city council "not to permit this Church to exist." *Id.* at 541-42. Also, the city attorney commented that the ordinance indicated that "[t]his community will not tolerate religious practices which are abhorrent to its citizens." *Id.* at 542.

This evidence of animus demonstrated that the city used an ordinance that otherwise has a rational basis to punish a disfavored viewpoint. Similarly, Plaintiffs would have to show that Defendants rejected the challenged courses to punish religious viewpoints rather than out of rational concern about the academic merit of those religious viewpoints.

[11]Here, Plaintiffs provide no evidence of animus. Instead, Plaintiffs essentially argue that Defendants had no rational basis for their actions and therefore they must have been motivated by animus. This argument adds nothing to the constitutional analysis; if Defendants had no rational basis, the Court need not reach the issue of animus.

Accordingly, there is no genuine issue of material fact as to this issue. Defendants' ***989** decisions to reject the courses challenged by Plaintiffs were not motivated by animus.

b. *Rational Basis Review*

Defendants' course approval decisions are subject to rational basis review. (Prior Order 37.) Under rational basis review, government regulation is "accorded a strong presumption of validity." *Heller v. Doe by Doe*, 509 U.S. 312, 319 (1993). Rationality review "is not a license for courts to judge the wisdom, fairness, or logic of government regulation." *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993); *see also City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) ("[T]he judiciary may not sit as a super legislature to judge the wisdom or desirability of legislative policy determinations."). "The burden is on the one attacking the [regulation] to negative every conceivable basis which might support it." *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973); *see also Kimel v. Florida Bd. of Regents*, 528 U.S. 62 (2000) ("When conducting rational basis review the court will not overturn ... government action unless [it] is so unrelated to the achievement of any combination of legitimate purposes that the court can only conclude that the government's actions were irrational.").

"When judges are asked to review the substance of a genuinely academic decision ..., they should show great respect for the faculty's professional judgment." *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 225 (1985). "Plainly, [courts] may not override [this judgment] unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment." *Id.* Indeed, "restrained judicial review of the substance of academic decisions" enables

academic freedom to thrive. *Id.; see also id.* at 226 n. 12 ("Academic freedom thrives not only on the independent and uninhibited exchange of ideas among teachers and students, but also, and somewhat inconsistently, on autonomous decisionmaking by the academy itself ....") (internal citations omitted).

[12]Plaintiffs challenge Defendants' decision to reject four Calvary courses and a non-Calvary Biology course.[7] To survive summary judgment, Plaintiffs must offer enough facts to create a genuine issue of material fact as to whether no rational basis existed to reject a course.

i. *Calvary's English Course-Christianity and Morality in American Literature*

Plaintiffs challenge Defendants' decision to deny approval for *Christianity and Morality in American Literature,* an English course submitted by Calvary. (*See* Pls.' Ex. 617; Costales Decl. Tab 1.)

This course proposed a primary text published by A Beka titled *Classics for Christians.* Jeanne Hargrove, a UC course reviewer, found this text inappropriate as a primary text in English because its "selection of works and pedagogical apparatus were inconsistent with ... expectations regarding critical thinking and broad exposure to writers' key works." (Hargrove Decl. ¶ 5.)

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[7] Although Plaintiffs identified two other courses in its interrogatory response, their list of as-applied claims does not include these courses and their Opposition does not address them.

Defendants' English expert, Professor Samuel Otter,[8] concurs, finding the text ***990** inadequate for a college-preparatory English class because it "fails to provide substantial readings and because it insists on specific interpretations [of those readings]" (Otter Decl. Ex. A, at 4.) "Such a combination contradicts the emphasis on analytical and critical thinking required [by the A-G Guidelines]." (Otter Decl. Ex. A, at 7.) These deficiencies rendered the text inadequate to provide "analytical and critical skills." (Otter Decl. Ex. A, at 4.) Further, Professor Otter specifically notes that the text's failures are "not because it offers a 'Christian and civic' perspective on its materials...." (Otter Decl. Ex. A, at 4.)

In addition, the primary text is an "anthology of excerpts," which UC does not approve, no matter the content of the excerpts. "College-preparatory courses are expected to require students to read full-length works." (Lynch Decl. No. 1 Ex. 2, at 5.) Plaintiffs' English expert, **[13]**Dr. Sandra Stotsky,[9] agreed in her deposition that a general rule against anthologies of excerpts is reasonable. (Lynch Decl. No. 2 Ex. 104.)

Plaintiffs offer little admissible evidence to the

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[8] Professor Otter has taught American literature for sixteen years at the University of California, Berkeley. (Otter Decl. Ex. A, at 3.)

[9] Dr. Stotsky is an independent researcher and consultant in education. She received her doctorate in reading research and reading education from the Harvard Graduate School of Education and serves on the National Mathematics Advisory Panel. (Stotsky Decl. Ex. I.)

contrary. Dr. Stotsky submitted a declaration comparing the viewpoints of several English texts, including the A Beka anthology. (Watters Decl. Ex. W.) However, she does not refute Professor Otter's conclusions that the text is inappropriate for college-preparatory work and insists on specific interpretations of its content. Dr. Stotsky also does not opine that Defendants unreasonably rejected this course.

Accordingly, there is no genuine issue of material fact as to this issue. Defendants had a rational basis for rejecting Calvary's proposed English course.

ii. *Calvary's History Course-Christianity's Influence on America*

Plaintiffs challenge Defendants' decision to deny approval for *Christianity's Influence on America*, a History course submitted by Calvary. (*See* Pls.' Ex. 607.)

This course proposed a primary text published by Bob Jones University ("BJU") titled *United States History for Christian Schools*. (Pls.' Ex. 607, at 11.) [10] Professor James Given, while on the UC course review committee, reviewed this text and concluded

[10] Plaintiffs argue that this course proposed "a secular text as well as the [BJU] textbook, and those secular texts ensured that standard content and required skills were taught." (Opp'n 17 (internal citations omitted).) The only other text listed on the course description is *Pilgrims in Their Own Land: 500 Years of Religion in America*. Plaintiffs offer no admissible evidence for their contention that this "secular text ensured that standard content and required skills were taught."

that the text failed to adequately teach critical thinking and modern historical analytic methods. Professor Given reached this conclusion because the text:

> instructs that the Bible is the unerring source for analysis of historical events, attributes historical events to divine providence rather than analyzing human action, evaluates historical figures and their contributions based on their religious motivations or lack thereof and contains inadequate treatment of several *991 major ethnic groups, women, and non-Christian religious groups.
> [14](Given Decl. ¶ 8.)

Defendants' History expert, Professor Gary Nash,[11] concurred with Professor Givens' evaluation, finding that the text should not be used as the primary text for a college-preparatory History course. (Nash Decl. Ex. A, at 6.) Specifically, Nash found that the text failed to encourage "historical thinking skills and analytical thinking" and failed to cover "major topics, themes, and components of United States history." (Nash Decl. Ex. A, at 6.)

"From reading the [reviewed text], students will have little opportunity to exercise independent judgment, to sharpen their critical thinking skills, or to consider multiple perspectives of those who made our history." (Nash Decl. Ex. A, at 9.) These students

[11] Professor Nash has taught History at the University of California, Los Angeles for "nearly forty years." (Nash Decl. Ex. A, at 3.)

"will have difficulty understanding history as a discipline as it has been practiced since Herodotus and Thucydides-a never-ending quest to reconstruct the past based on new evidence and informed by new questions posed about the functioning of past societies." (Nash Decl. Ex. A, at 9.)

Plaintiffs offer little admissible evidence to the contrary. Plaintiffs' History expert, Professor Paul Vitz, submitted a declaration concluding that the BJU text covers the "basic facts, events, and issues of [United States] history...." (Watters Decl. Ex. X ¶ 34.) However, he does not refute Professor Given's and Professor Nash's conclusions that the text fails to teach historical analytic methods. Professor Vitz also does not opine that Defendants unreasonably rejected the course.

Accordingly, there is no genuine issue of material fact as to this issue. Defendants had a rational basis for rejecting Calvary's proposed History course.

iii. *Calvary's Government Course-Special Providence: Christianity and the American Republic*

Plaintiffs challenge Defendants' decision to deny approval for *Special Providence: Christianity and the American Republic*, a Government course submitted by Calvary. (*See* Pls.' Ex. 608.)

[15]This course proposed a primary text published by BJU titled *American Government for Christian Schools*. (Pls.' Ex. 608, at 37.) The UC reviewer found that "the content of the course outline[ ] ... is not consistent with the empirical

historical knowledge generally accepted in the collegiate community." (Costales Decl. Tab 3.)

Defendants' Government expert, Professor Mark Petracca concurred,[12] evaluating the BJU Government text and finding that "[u]se of this [text] as the principal text in a United States Government course will not provide adequate preparation for study at UC." (Petracca Decl. Ex. A, at 2.) Professor Petracca found that the BJU Government text does not acknowledge the commonly-accepted framework for scholarly analysis and provides little opportunity for critical thinking. (Petracca Decl. Ex. A, at 2.) In addition, the text contains "many factual and empirical assertions that are not generally accepted among political scientists [or] historians and that are nevertheless not substantiated within the text by evidence." (Petracca Decl. Ex. A, at 3.)

Plaintiffs offer little admissible evidence to the contrary. Plaintiffs' Government expert, Professor Vitz, submitted a declaration***992** concluding that the BJU Government text "appear[s] to give a reasonably adequate presentation of the basic subject matter-the nature of the American government...." (Watters Decl. Ex. X ¶ 55.) However, he does not refute Professor Petracca's conclusions that the text does not acknowledge the commonly-accepted framework for scholarly analysis and contains factual and empirical assertions that are not generally accepted. Professor Vitz also does not

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[12] Professor Petracca has served for nine years as the Chair of the Department of Political Science at the University of California, Irvine. (Petracca Decl. Ex. A, at 4.)

opine that Defendants unreasonably rejected the course.

Accordingly, there is no genuine issue of material fact as to this issue. Defendants had a rational basis for rejecting Calvary's proposed Government course.

iv. *Calvary's Elective Course-World Religions*

Plaintiffs challenge Defendants' decision to deny approval for *World Religions*, an elective course submitted by Calvary.

[16]Defendants rejected this course for both History and elective credit. The feedback provided to Calvary regarding this course is telling. As an initial matter, Defendants rejected the course as an elective because the course was "intended for 9-12th graders and does not have a prerequisite...." (Costales Decl. Tab 4, at 54.) Defendants noted that this deficiency could be corrected by "redesign[ing] the course for 11th/12th graders only" or "add[ing] an appropriate prerequisite." Plaintiffs do not argue that these bases for rejection are irrational.

In addition, Defendants noted three substantive deficiencies in the course description and offered to approve the course if Calvary clarified these issues. (Costales Decl. Tab 4, at 54.) First, Defendants could not confirm that the proposed text, *World Religions* by Dan Halverson, existed, and asked Calvary to accurately identify the text. Second, Defendants asked Calvary to provide further information about key assignments. Finally, Defendants asked Calvary to demonstrate how the course treats the study of

religion from the standpoint of scholarly inquiry. Defendants' religion expert, Professor Robert Sharf,[13] testified that these decisions were reasonable.

Plaintiffs offer little admissible evidence to the contrary. Plaintiffs' religion expert, Professor Daniel Guevara, offers no opinion specific to this course. (Watters Decl. Ex. H.) Further, Plaintiffs offer nothing to refute Defendants' evidence that it had a rational basis for rejecting the course completely unrelated to its subject matter. Finally, the course rejection feedback makes clear that the course may have been approved with minimal clarification. Plaintiffs provide no evidence that Calvary attempted to clarify the course content and received a second rejection.

Accordingly, there is no genuine issue of material fact as to this issue. Defendants had a rational basis for rejecting Calvary's proposed elective course.

v. *The Non-Calvary Biology Course*

Plaintiffs challenge Defendants' decision to deny approval for the Biology course submitted by Calvary Baptist School. Although Calvary Baptist has a similar name, it is not the same school as Calvary.

[17]This course proposed a primary text published by A Beka titled *Biology: God's Living*

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[13] Professor Sharf is the Director of Religious Studies at the University of California, Berkeley. (Sharf Decl. Ex. A, at 3-4.)

Creation. (Pls.' Ex. 624, at 40.) UC Professor Barbara Sawrey reviewed this text and concluded that it was inappropriate***993** for use as the primary text in college-preparatory science classes. (Sawrey Decl. ¶ 3.) Professor Sawrey found the text problematic because it characterized religious doctrine as scientific evidence, included scientific inaccuracies, failed to encourage critical thinking, and took an "overall un-scientific approach to the subject matter." (Sawrey Decl. ¶ 3.) [14]

Sawrey's "judgment was based not on the fact that the textbooks contained religious references and viewpoints, but on [her] conclusion that [the texts] would not adequately teach students the scientific principles, methods, and knowledge necessary for them to successfully study those subjects at UC." (Sawrey Decl. ¶ 3.) [15] After forming her conclusions,

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[14] The UC Position Statement on Science Courses reflects these concerns:

> The texts in question are primarily religious texts; science is secondary.... Courses that utilize these texts teach students that their conclusions must conform to the Bible, and that scientific material and methods are secondary. Students who [are] taught to discount the scientific process and the scientific conclusions validated by a wealth of scientific research are not being provided with an understanding of scientific principles expected by the UC faculty.

(Wilbur Decl. No. 2 Ex. 2.)

[15] Similarly, some Christian schools have declined to use BJU and A Beka textbooks because of concerns about the texts' academic merit. (Lynch Decl. No. 1 Exs. 47B ("[Valley Christian School] felt that the A Beka books ... did not represent the same level of academic rigor as we could find in some other texts."), 47C ("[Patten Academy declined to use A Beka and BJU textbooks] because they didn't provide the content that the

Professor Sawrey shared her findings with other members of the course review committee, who supported her conclusions. (Sawrey Decl. ¶ 4.)

Defendants' biology experts, Professors Donald Kennedy [16] and Francisco Ayala,[17] reviewed the A Beka text and a second Biology text published by BJU and concurred in her judgment. [18]Professor Kennedy determined that "[b]y teaching students to reject scientific evidence and methodology whenever they might be inconsistent with the Bible ... both texts fail to encourage critical thinking and the skills required for careful scientific analysis." (Kennedy Decl. Ex. A, at 8.) Professor Ayala found that the texts "reject the methodology generally accepted in science, which relies on observation and experimentation and on the formulation of laws and theories that need to be tested rather than accepted on the basis of the Bible or any other authority." (Ayala Decl. Ex. A, at 4.)

Both professors concluded that neither the A Beka nor the BJU Biology texts are appropriate for use as the principal text in a college preparatory biology course. (Ayala Decl. Ex. A, at 28; Kennedy

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principal and faculty believed would prepare the youngsters to meet their post-high school goals."); *cf.* Lynch Decl. No. 1 Ex. 47A ("[Oaks Christian School] acknowledge[s] that there was a much fuller treatment of evolution in the secular book that [it] used [than the BJU biology textbook, which it did not use].").)

[16] Professor Kennedy, the editor-in-chief of *Science* magazine, teaches biology at Stanford University, where he once served as President of the University. (Kennedy Decl. Ex. A, at 4-5.)

[17] Professor Ayala teaches biological sciences at University of California, Irvine. (Ayala Decl. Ex. A, at 4.)

Decl. Ex. A, at 20.) In making this finding, Professor Kennedy reiterated Professor Sawrey's initial conclusion that "the problem is not ... that the creationist view is taught as an alternative to scientific explanations, but that the nature of science, the theory of evolution, and critical thinking are not taught adequately." (Kennedy Decl. Ex. A, at 7.)

*994 Plaintiffs offer little admissible evidence to the contrary. Plaintiffs' Biology expert, Dr. Michael Behe, submitted a declaration concluding that the BJU text mentions standard scientific content. (Watters Decl. Ex. U.) However, Professor Behe "did not consider how much detail or depth" the texts gave to this standard content. (Watters Decl. Ex. U ¶ 4.) Therefore, Professor Behe fails to refute one of Professor Kennedy's primary concerns that the nature of science, the theory of evolution, and critical thinking are not taught adequately.

Accordingly, there is no genuine issue of material fact as to this issue. Defendants had a rational basis for rejecting Calvary Baptist's proposed Biology course.

2. *Free Exercise and Establishment Clauses*

In their prior summary judgment motion, Plaintiffs argued that Defendants exhibited unconstitutional "hostility" toward religion, identifying 14 allegedly hostile acts that did not quite qualify as facial challenges.

Nine of these acts were allegedly

unconstitutional symbolic burdens in violation of the Establishment Clause. In the Prior Order, this Court determined that these nine acts were not [19]unconstitutional symbolic hostility under the Establishment Clause. (Prior Order 44-47.) That analysis still controls.[18]

The remaining five acts allegedly burdened Plaintiffs' religious practices in violation of the Free Exercise Clause. In the Prior Order, this Court determined that two of these alleged acts were not supported by any evidence and that Plaintiffs failed to show that two other acts had burdensome consequences. (Prior Order 47-48.) That analysis still controls.

Accordingly, only one allegedly hostile act remains before the Court-"[UC] reviewers all wrote that religion courses taught by Cantwell/Sacred Heart of Mary should be rejected because they taught a single perspective." (Prior Order 48.) Because this allegedly burdensome hostile act must be analyzed under the Free Exercise Clause, Plaintiffs must show that Defendants had no rational basis for the course rejection or that Defendants rejected the course because of animus.

As mentioned above, Plaintiffs provide no evidence of animus similar to the facts in *Lukumi*. In addition, Plaintiffs provide no expert testimony that this course was irrationally rejected. Because

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[18] Despite this analysis, the Court did not previously grant summary judgment in favor of Defendants on this issue solely because Defendants had not moved for summary judgment on these claims.

Plaintiffs fail to raise a genuine issue of material fact, Defendants are entitled to summary judgment on this claim.[19]

3. *Equal Protection Clause*

As discussed in the Prior Order, claims based on religious discrimination that survive the *Lemon* test are subject to rational basis scrutiny under the Equal Protection Clause. (Prior Order 36-37 (citing *Locke v. Davey*, 540 U.S. 712, 720 n. 3 (2004); *Johnson v. Robison*, 415 U.S. 361, 375 n. 14 (1974)).)

[20]Because Defendants' course decisions survive rational basis scrutiny (*see* Part ***995** II.B.1.b of this Order), Defendants are entitled to summary judgment on Plaintiffs' as-applied equal protection claims.

III. *RULING*

Because Plaintiffs fail to raise any genuine issue of material fact to support their as-applied claims, Defendants' Motion is GRANTED.

IT IS SO ORDERED.

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[19] To the extent Plaintiffs claim that specific course rejections violate the Free Exercise Clause or Establishment Clause, Plaintiffs provide no analysis in addition to its arguments under the Free Speech Clause. The Court's conclusion that the course rejections were rationally based and not motivated by animus defeats Plaintiffs' challenge under the Free Exercise Clause and Establishment Clause.

APPENDIX C

UNITED STATES DISTRICT COURT,
CENTRAL DISTRICT OF CALIFORNIA.

No. CV 05-6242 SJO (MANx)

ASSOCIATION OF CHRISTIAN SCHOOLS INTERNATIONAL, ET AL., V. ROMAN STEARNS, ET AL.,

March 28, 2008

ORDER DENYING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND GRANTING DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT [Docket Nos. 70 & 71]

S. JAMES OTERO, District Judge.

This matter is before the Court on Plaintiffs' Motion for Summary Judgment and Defendants' Motion for Partial Summary Judgment, both filed on August 27, 2007. Oppositions and Replies have been filed as to both Motions. After hearing argument on February 14, 2008 and carefully considering all admissible documents and the arguments made in support of and in opposition to each Motion, the Court DENIES Plaintiffs' Motion for Summary Judgment and GRANTS Defendants' Motion for Partial Summary Judgment.

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[1]*1088 I. *BACKGROUND*

Defendants are the University of California ("UC") employees responsible for developing and implementing the admissions policy by which applicants are selected to attend UC.[1] Plaintiffs are the Calvary Chapel Christian School ("Calvary"), five Calvary students, and the Association of Christian Schools International ("ACSI").

Plaintiffs have brought suit against Defendants, alleging that the UC admissions policy is

[1] These UC employees are Roman Stearns (Special Assistant to the UC President), Susan Wilbur (Director of Undergraduate Admissions), Robert Dynes (UC President), Michael Brown (former Chair of the Board of Admissions and Relations with Schools ("BOARS")), and Judy Sakaki (Vice President for Student Affairs).

unconstitutional under the Free Speech Clause, the Free Exercise Clause, the Establishment Clause, and the Equal Protection Clause.

A. *The UC Admissions Process*

Each year, UC must decide which of California's more than 360,000 high school graduates will be admitted to attend one of UC's ten campuses. (Defs.' MSJ 2.) California applicants are admitted to UC only if they qualify through one or more of the following four "Paths":

Path 1: By meeting specified requirements for coursework, grade point average, and test scores.

Path 2: By ranking in the top four percent at participating California high schools.

Path 3: By scoring exceptionally high on standardized tests.

Path 4: By demonstrating the potential to succeed at UC despite not falling in any other category.

(Lynch Decl. No. 1 Exs. 1 (describing Paths 1, 2, and 3), 19 (describing Path 4).)

About eighty-two percent of California applicants who are admitted to UC qualify only through Path 1 or Path 2. (Pls.' Exs. 62, 64.) [2]To qualify through

[2] More than sixteen percent of California students admitted to UC score high enough on standardized tests to qualify through Paths 1, 2, and 3. (Pls.' Ex. 64, at 68.) Only one percent are admitted to UC solely through Path 3 (Pls.' Ex. 62,

Path 1 or 2, the applicant must demonstrate proficiency in seven specific subjects: (a) history and social science; (b) English; [2](c) mathematics; (d) laboratory science; (e) foreign languages; (f) the visual or performing arts; and (g) electives. (Lynch Decl. No. 1 Exs. 4, 17.) UC refers to these seven subjects as the "A-G Subjects."

A student may demonstrate proficiency in an A-G Subject by achieving a sufficiently high grade or score:

(a) in UC-approved high school courses;

(b) in a college course at an accredited university;

(c) on the corresponding SAT II subject test; or

(d) on the International Baccalaureate or Advanced Placement exam.

(Wilbur Decl. ¶ 8.) Nearly all of the applicants qualifying through Paths 1 and 2 demonstrate proficiency in the A-G Subjects by taking UC-approved high school courses. (Defs.' MSJ 4.) Plaintiffs' constitutional claims center on UC's method for approving high school courses.[3]

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at 41.) Another one percent of students are admitted solely through Path 4. (Pls.' Ex. 65, at 180.)

[3] Plaintiffs erroneously argue that the UC course review process "render[s] Christian school students ineligible for ninety-eight percent of the seats in the entering class" because of rejected Christian school courses. (Pls.' MSJ 29.) Even setting aside that students have alternative ways to demonstrate proficiency in the A-G Subjects, eighteen percent of California students are admitted without needing to demonstrate proficiency (not two percent, as Plaintiffs contend).

*1089 B. *The A-G Guidelines*

For an applicant to demonstrate proficiency in the A-G Subjects through high school courses, she must take a minimum number of UC-approved courses. The number of courses a student must take to demonstrate proficiency varies by subject, ranging from a year-long course in the arts to four year-long courses in English. (Lynch Decl. No. 1 Ex. 4.)

UC requires applicants to take approved courses "to make [the UC] eligibility standards substantively meaningful and to ensure that the students whom it guarantees a spot have earned their relevant grades in courses that are sufficiently rigorous to prepare the students for study at UC." (Defs.' MSJ 2 (citing Rashid Decl. ¶ 7).)

[3]High schools seeking course approval must provide UC with a satisfactory course description. (Defs.' Opp'n 6; *see also* Lynch Decl. No. 2 Ex. 93.) The typical course description is three to five pages in length. (Pls.' MSJ 2.) UC evaluates this course description in light of the A-G Guidelines, which provide about one page of general principles per

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Further, if ninety-eight percent of Christian school students were ineligible, Plaintiffs should be able to identify a significant number of students excluded from UC because of the course review process. Yet, "Plaintiffs do not show, and there is no evidence, that even one ACSI student has been denied UC eligibility as a result of any actions challenged" in this case. (Defs.' Opp'n 4.)

subject area (Pls.' Ex. 61) and hundreds of pages of examples of approved course outlines for each subject (Lynch Decl. No. 1 Ex. 2).

In deciding whether to approve a course, UC reviews the submitted course descriptions to determine whether the course challenges students academically, involves substantial reading and writing, teaches critical thinking skills, emphasizes both analytical thinking and factual content, and develops students' oral and listening skills. (Lynch Decl. No. 1 Ex. 6, at 4; Wilbur Decl. ¶ 10.) UC also seeks to ensure that the course will sufficiently prepare students for UC study. (Lynch Decl. No. 1 Ex. 6, at 4.) Courses that meet these standards are approved.

However, UC will not approve courses that "fail[ ] to teach topics with sufficient accuracy and depth" or "fail[ ] to teach relevant analytical thinking skills." (Defs.' Opp'n 7.)

Occasionally, UC reviews individual textbooks where the subject area is one where "selected texts tend strongly to guide course content" (such as history, mathematics, and science) and the "course outline[ ] raise[s] concerns about whether the course meets faculty guidelines ...." (Pls.' Ex. 241.) UC does not interview the teachers, observe classroom instruction, or test the students. (Pls.' MSJ 2.) UC does not review courses taken by applicants from out-of-state high schools (Pls.' MSJ 2), which comprise approximately fourteen percent of the applicant pool and about nine percent of admitted students (Pls.' Ex. 80; Wilbur Decl. No. 2 ¶ 53).

C. The "A-G Policies"

Plaintiffs allege that Defendants, in applying the A-G Guidelines, have established a set of binding "A-G Policies" that are used to routinely deny courses submitted by religious high schools. The official-sounding term "A-G Policies" is a label Plaintiffs created to describe what they believe are secret rules by which Defendants deny Plaintiffs' courses. (Pls.' Opp'n 3.) The extent to which these "A-G Policies" exist is discussed in Part II.A of this Order.

[4]Plaintiffs contend that "[t]hese policies require rejection of courses, regardless of their standard content, that add a single religious viewpoint, any instance of God's ***1090** guidance of history, or any alternative ... to evolution." (Pls.' Reply 1.)

As evidence of these "policies," Plaintiffs submit numerous UC Position Statements regarding the A-G Guidelines. For example, the UC Position Statement concerning history courses notifies Christian schools that they "can develop and submit for UC approval a secular history curriculum with a text and course outline that addresses course content / knowledge generally accepted in the History / Humanities / Social Sciences community." (Pls.' Ex. 242.)

Further, Plaintiffs contend that Defendants use form language when rejecting a course because of religious perspectives. For example, when UC rejects a religious school's biology course, it notifies the

school that "[t]he content of the course outlines submitted for approval is not consistent with the viewpoints and knowledge generally accepted in the scientific community." (Pls.' Exs. 1, 246, 305.)

Finally, Plaintiffs rely on the depositions of multiple witnesses who are responsible for reviewing courses or otherwise interpreting the A-G Guidelines. Plaintiffs claim that these depositions reveal that "UC follows a policy rejecting any course in any subject, even if it teaches standard content, if it adds teaching of the school's religious viewpoint." (Pls.' MSJ 6 (citing the depositions of Susan Wilbur, Robert Sharf, James Given, Gary Nash, Mark Petracca, and Francisco Ayala).)

Plaintiffs assert that religious school courses are approved at a lower rate than secular school courses because of these discriminatory policies. For example, for the 2004 school year, 56.3 percent of courses submitted by Christian schools were approved (Pls.' Ex. 287, at 928), while 86.3 percent of courses submitted by secular schools were approved (Pls.' Exs. 286-87). Defendants disagree, providing evidence that religious school courses are denied at about the same rate as other secular private schools. (Wilbur Decl. No. 2 Ex. 1 (graphing course approval rates for various categories of schools, including ACSI schools, "non-Catholic" private schools, and public schools).)

[5]Defendants admit to creating UC Position Statements and form rejection language, but deny Plaintiffs' assertion that UC has a policy of "den[ying] students a-g credit for otherwise

acceptable courses that teach standard content and that add religious viewpoints...." (Defs.' Opp'n 1.)

D. *The Parties' Motions for Summary Judgment*

Now, both parties move for summary judgment. Plaintiffs seek summary judgment that the UC course review process is unconstitutional on its face and as applied to Plaintiffs. Defendants seek summary judgment on Plaintiffs' facial claims, reserving for trial their proof that they constitutionally applied their regulations to Plaintiffs' courses.

II. *DISCUSSION*

Summary judgment is proper only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). A "material" fact is one that could affect the outcome of the case, and an issue of material fact is "genuine" if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). When evaluating a motion for summary judgment, the Court "construes the evidence in the light most favorable to the nonmoving party." *1091 *Rivera v. Philip Morris, Inc.*, 395 F.3d 1142, 1146 (9th Cir.2005).

Plaintiffs argue that the UC course review process on its face and as applied to Plaintiffs' courses is unconstitutional because the review process:

(1) discriminates against religious viewpoints and regulates speech based on content;

(2) is overbroad;

(3) provides course reviewers with "unbridled discretion";

(4) shows "hostility toward religious schools";

(5) prescribes what shall be orthodox in religion; and

(6) abridges equal protection.

[6]Plaintiffs' six claims require examination of the A-G Guidelines and the purported "A-G Policies" under the Free Speech Clause, the Establishment Clause, the Free Exercise Clause, and the Equal Protection Clause.

A. *The Scope of Plaintiffs' Facial Challenge*

The parties disagree as to the scope of Plaintiffs' facial challenge. Defendants argue that a facial challenge is limited to the text of the A-G Guidelines, while Plaintiffs contend that a facial challenge must include analysis of the A-G Policies. Neither party supports its argument with legal authority.

In some circumstances, courts have considered the government's authoritative interpretation of its guidelines and ordinances in a facial challenge. *See, e.g., Santa Monica Food Not Bombs v. City of Santa Monica*, 450 F.3d 1022, 1035 (9th Cir.2006); *see also Forsyth County v. Nationalist Movement*, 505 U.S. 123, 131 (1992) ("In evaluating respondent's facial challenge, we must consider the county's authoritative constructions of the ordinance, including its own implementation and interpretation of it."). "To affect the constitutional analysis, [an authoritative interpretation] must 'be made explicit by textual incorporation, binding judicial or administrative construction, or **well-established practice.**' " *Food Not Bombs*, 450 F.3d at 1035 (quoting *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 770 (1988)).

Through significant documentation and testimony, Plaintiffs have shown that Defendants have a well-established practice of using policies outside of the A-G Guidelines to evaluate courses. Defendants have created UC Position Statements and form language rejection letters by which they consider themselves bound. *See also Ward v. Rock Against Racism*, 491 U.S. 781, 795 (1989) ("[T]he city has interpreted the guideline in such a manner as to provide additional guidance to the officials charged with its enforcement."); *cf. Lakewood*, 486 U.S. at 770 ("This Court will not write nonbinding limits into a silent state statute.").

In addition, Plaintiffs ask the Court to find that Defendants have three specific A-G Policies.

[7]1. *The "Single Religious Viewpoint Policy"*

First, Plaintiffs contend that Defendants have a policy of rejecting courses that contain standard content, but add a single religious viewpoint. (Pls.' MSJ 6; Pls.' Opp'n 2; Pls.' Reply 1.) Yet, the evidence establishes otherwise.

Defendants have approved many high school courses that include religious material and viewpoints, including courses such as "The Prophetic Voice" (Hargrove Decl. Ex. 3, at 430), "Western Civilization: The Jewish Experience" (Hargrove Decl. Ex. 6, at 574), and "The Bible as Literature" (Hargrove Decl. Ex. 3, at 535). Western Christian Academy submitted its "Language***1092** Arts 12" course for approval as an English course. (Hargrove Decl. Ex. 3, at 459.) This course relies on a Christian textbook published by Alpha Omega Publications. (Hargrove Decl. Ex. 3, at 461.) The course description includes assignments such as "Write an essay on the Christian view of nature as demonstrated in Jesus' use of elements of nature in His parables" and "Write an essay contrasting the Byronic manner of facing guilt with the way the Bible says Christians should deal with guilt." (Hargrove Decl. Ex. 3, at 462.) Despite its religious content, this course was approved. (Hargrove Decl. ¶ 10.)

Although Defendants disapprove of some Christian "science" textbooks that "prioritize religion over science" when used as the primary or sole text in an A-G Subject course (Hargrove Decl. ¶ 10), they do approve many courses that utilize these texts as

secondary texts (Hargrove Decl. ¶ 14; Wilber Decl. No. 2 ¶ 7). [4]Further, Defendants reviewed and approved some Christian textbooks for use as the primary or sole text, including *Chemistry for Christian Schools* and *Physics for Christian Schools.* (Pls.' Ex. 100.) This indicates that Defendants are not withholding approval solely because the course includes a religious viewpoint.

For example, Defendants have approved biology, physics, and chemistry courses using Christian texts, including a chemistry course taught at Calvary that utilized two texts-*Modern* **[8]***Chemistry and Chemistry for Christians* (Hargrove Decl. Ex. 5, at 565) and a biology course taught by Kings Christian High School that utilized three texts-*Biology: God's Living Creation, Biology,* and *Health Biology* (Hargrove Decl. Ex. 3, at 540-44).

Finally, Defendants provide declarations from religious school administrators who have not perceived the discrimination about which Plaintiffs complain. For example, the Assistant Principal for Curriculum at Loyola High School of Los Angeles, a self-described "Jesuit College Preparatory" school, does not believe that "UC discriminates against Catholic high schools by denying [A-G course approval] for courses that otherwise meet UC's academic standards but that add religious content or a religious viewpoint." (Kozakowski Decl. ¶¶ 5-6, 9.)

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[4] However, not all courses restricting use of Christian texts to supplemental status are approved. If the supplemental text "interfere[s] with the students' acquisition of the knowledge, understanding, and skills that UC expects [the student] to have gained," the course may not be approved. (Hargrove Decl. ¶ 10.)

Also, the Director of College Guidance at New Community Jewish High School notes that "[i]n [his] experience, UC has treated New Community and its students fairly and in a non-discriminatory manner." (Lindner Decl. ¶¶ 6-8.) Even administrators at schools that are members of ACSI have admitted that "I can't think of any areas where I felt-I feel like Valley Christian has been treated differently because we're a Christian institution compared to any other school." (Lynch Decl. No. 2 Ex. 115.) Although such anecdotal evidence is of minimal value, it does lend some support to Defendants' assertion that they hold *all* schools-religious or secular-to the same rigorous standards.

The evidence establishes that Defendants do not have a policy of rejecting courses solely because the courses add a religious viewpoint. Plaintiffs provide no evidence of an actual policy. Instead, Plaintiffs rely on the existence of course rejections and abstract hypothetical situations posed to course reviewers and experts, and ask the Court to draw an inference of a "policy" that can be challenged facially.

***1093** For example, Plaintiffs cite the deposition of Defendants' government expert as evidence that "UC follows the policy of rejecting any course in any subject, even if it teaches standard content, if it adds teaching of the school's religious viewpoint." (Pls.' MSJ 6.) The actual deposition testimony illustrates Plaintiffs' error. Defendants' government expert,

Professor Mark Petracca, [5][9]testified that any government course that presents a "single, unassailable standard for evaluating government, truth, civic and political leaders, culture, and justice" would not be considered "conventional social science" and fails to "prepare students adequately for study at UC." (Petracca Dep. 20-21.) Professor Petracca explains in his expert report that a "single, unassailable standard," regardless of its perspective, contradicts "the pluralistic and inquisitive approach" to the study of government "used by professors and expected of students at UC." (Petracca Decl. Ex. A, at 2.)

Indeed, Petracca elaborates that "I am not saying, either here or elsewhere, that it is inappropriate for the textbook or a course to present a Bible-based or Christian perspective on American government." (Petracca Decl. Ex. A, at 3.) However, it is inappropriate for a college preparatory government course to present a single perspective in a manner that fails to even acknowledge that other analytical frameworks exist. (Petracca Decl. Ex. A, at 3.)

Upon inspection, Plaintiffs' conclusion premised on a few lines of Professor Petracca's deposition does not hold. Petracca's deposition testimony is completely consistent with his expert report.[6] Plaintiffs must show more than the "mere existence

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[5] Professor Petracca has served for nine years as the Chair of the Department of Political Science at the University of California, Irvine. (Petracca Decl. Ex. A, at 4.)

[6] Similarly, Plaintiffs' "evidence" based on other depositions does not withstand even the slightest scrutiny.

of a scintilla of evidence ...; there must be evidence on which the jury could reasonably find" for Plaintiffs. *See Anderson*, 477 U.S. at 252; *see also Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986) ("[Plaintiffs] must do more than simply show that there is some metaphysical doubt as to the material facts....").

Accordingly, there is no genuine issue of material fact as to this issue. Defendants do not have a "well-established practice" of rejecting courses that contain standard content, but add a single religious viewpoint.

2. *The "History and Social Science Policy"*

Second, Plaintiffs contend that Defendants have a policy of rejecting history and social science courses that "add a Christian god" or that are "limited to one denomination or viewpoint." **[10]**(Pls.' MSJ 9-13.) To the contrary, Defendants provide evidence of approved history courses taught from the perspective of a single religious denomination. (Wilbur Decl. No. 2 ¶¶ 33, 42; Hargrove Decl. ¶ 16, Ex. 6.) In addition to the "Western Civilization: The Jewish Experience" course described above, UC approved courses such as Sierra Christian Academy's "World History" course, which seeks to "understand[ ] and appreciate[ ] the beginnings of Western Civilization from a Judeo-Christian point of view" (Hargrove Decl. Ex. 6, at 592), and Valley Christian High School's "Ancient World History" course, which "cover[ ]s the time frame of *Creation* through the Reformation" (Hargrove Decl. Ex. 6, at 597 (emphasis added)).

*1094 Further, Defendants explain that the mention of God in the explanation of a historical event does not "automatically disqualify a course for approval." (Given Decl. ¶ 5 (noting that supernatural-based explanations of history do not "automatically disqualify a course for approval," but "excessive reliance" on these explanations may prevent approval).) Rather, the focus is on whether the course as a whole meets the UC standards. (Wilbur Decl. No. 2 ¶ 32 ("[T]he mention of God as the explanation of [a] historical event may or may not cause rejection of a course for [history] credit, depending on whether the course, as a whole, meets the UC faculty's expectations for college preparatory history....").)

Again, there is no genuine issue of material fact as to this issue. Defendants do not have a "well-established practice" of rejecting history courses because they "add a Christian god" or "one religious perspective."

3. *The "Science Policy"*

Finally, Plaintiffs contend that Defendants have a policy of rejecting biology courses that, in addition to evolution, contain topics such as theistic evolution, intelligent design, creation, or weaknesses of evolution. (Pls.' MSJ 13-17.) Again, Defendants deny this allegation, explaining that biology courses may include scientific discussion of the weaknesses of evolution, creationism, or intelligent design. (Wilbur Decl. No. 2 ¶ 43 ("A biology course could be approved for [science] credit if it included both an adequate treatment of the theory of evolution and discussion of

creationism.").) For example, biology courses that use Christian texts that discuss perceived weaknesses of evolution, creationism, and intelligent design as *supplemental* texts can and have **[11]**been approved. (Wilbur Decl. No. 2 ¶ 7; Hargrove Decl. Ex. 3, at 540-44 (approving Kings Christian High School's biology course, which used A Beka's *Biology: God's Living Creation* as a supplemental text).)

Once more, there is no genuine issue of material fact as to this issue. Defendants do not have a "well-established practice" of rejecting biology courses that add theistic evolution, intelligent design, creation, or weaknesses of evolution.

In evaluating Plaintiffs' facial challenge, the Court will consider the A-G Guidelines, the UC Position Statements, and form rejection language (collectively referred to as the "A-G Guidelines and Policies").

B. *Plaintiffs' Facial Constitutional Claims*

Plaintiffs have brought a variety of constitutional claims against Defendants. They claim that the A-G Guidelines and Policies are unconstitutional on their face because these regulations violate rights guaranteed to religious schools under:

(1) the Free Speech Clause;

(2) the Free Exercise Clause;

(3) the Establishment Clause; and

(4) the Equal Protection Clause.

Each clause is addressed in turn.

1. *The Free Speech Clause*

Plaintiffs allege that the A-G Guidelines and Policies abridge their freedom of speech because the regulations: (1) discriminate based on viewpoint and content; (2) are overbroad; and (3) grant Defendants unbridled discretion.

a. *Viewpoint Discrimination and Content Regulation*

Plaintiffs vigorously attack the A-G Guidelines and Policies as viewpoint discrimination and content regulation. According to Plaintiffs, "UC policies, confirmed by hundreds of course rejections, discriminate by viewpoint and are content-based in regulation." (Pls.' Reply 3.) ***1095** Plaintiffs' briefs rely on *Rosenberger v. Rector & Visitors of University of Virginia*, 515 U.S. 819 (1995), and other public forum cases as the cornerstone of their argument, insisting that **[12]**" '[v]iewpoint discrimination is ... an egregious form of content discrimination' " (Pls.' MSJ 4 (quoting *Rosenberger*, 515 U.S. at 829)) and that " '[d]iscrimination against speech because of its message is presumed to be unconstitutional' " (Pls.' MSJ 21 (quoting *Rosenberger*, 515 U.S. at 828)).[7]

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[7] At oral argument, Plaintiffs identified three additional "keystone cases" in support of their argument that were not included in their brief: (1) *Board of Regents of University of Wisconsin System v. Southworth*, 529 U.S. 217 (2000); (2) *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*,

Yet, not all content-based regulations are subject to strict scrutiny. [8] The Supreme Court has repeatedly rejected a heightened standard where the government is providing a public service that by its nature requires evaluations of, and distinctions

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547 U.S. 47 (2006); and (3) *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992). (Tr. Hr'g 21.) Plaintiffs only discussed one of these cases in depth during its argument *Southworth*, which is easily distinguished from the present case.

In *Southworth*, the University of Wisconsin used student fees "for the sole purpose of facilitating the free and open exchange of ideas by, and among, its students." 529 U.S. at 229; *see also id.* at 222-23 ("In the University's view, the activity fees 'stimulat[ed] advocacy and debate on diverse points of view'...."). Accordingly, the Supreme Court found its "public forum cases are instructive by close analogy." Id. at 229-30.

Here, high school courses serve UC by preparing students for academic study, not by "facilitating the free and open exchange of ideas." The close analogy to a public forum in *Southworth* is missing in this case. Similarly, the need for content-based judgments present in this case is missing in *Southworth*. Perhaps the most relevant portion of the *Southworth* opinion is Justice Kennedy's pronouncement that began his legal analysis: "It is inevitable that government will adopt and pursue programs and policies *within its constitutional powers* but which nevertheless are contrary to the profound beliefs and sincere convictions of some of its citizens." *Id.* at 229 (emphasis added).

[8] Plaintiffs spend much of their briefing setting up a "viewpoint discrimination" straw man. But, the analysis in this case is not as simple as Plaintiffs' proffered syllogism: "Viewpoint discrimination is unconstitutional and UC discriminates based on viewpoint, therefore UC's actions are unconstitutional." Accordingly, Plaintiffs' "resounding" success in tearing this straw man down rings hollow. (*See* Pls.' Reply 3 ("UC's silence is resounding on our 22 pages of facts and argument showing that UC policies ... discriminate by viewpoint and are content-based in regulation.").)

based upon, the content of speech. *See, e.g., United States v. Am. Library Ass'n*, 539 U.S. 194, 204-05 (2003); *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 580 (1998); *cf. Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 672-73 (1998) (generalizing that governmental functions that require content-based **[13]**judgments, such as selecting programming for a public television station, are not subject to heightened scrutiny).

Instead, these regulations are constitutional if they are reasonably related to the government's goal of providing the public service and are not the product of government animus.[9] *See Am. Library*, 539 U.S. at 208 ("It is ***1096** entirely reasonable for public libraries ... to exclude certain categories of content...."); *Finley*, 524 U.S. at 587 ("The [government's] mandate is to make aesthetic judgments, and the inherently content-based 'excellence' threshold for [government] support sets it apart from the subsidy at issue in *Rosenberger* ...."); *Forbes*, 523 U.S. at 673-75 (cautioning against heightened scrutiny when the government necessarily makes content-based determinations).

In *Arkansas Education Television Commission v. Forbes*, the Supreme Court stressed that public television stations generally hold broad editorial discretion to select their content. 523 U.S. at 674 ("[T]he nature of editorial discretion counsels against

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[9] For reasons explained in Part II.B.I.a.ii., the government may not use otherwise lawful regulations to purposefully suppress a politically disfavored viewpoint. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993).

subjecting [public] broadcasters to claims of viewpoint discrimination.").[10] Public broadcasters are required to schedule programming that serves the "public interest, convenience, and necessity." *Id.* at 674 (citing 47 U.S.C. § 309(a)). In fulfilling this duty, a public broadcaster engages in speech activity by "facilitating the expression of some viewpoints instead of others." *Forbes*, 523 U.S. at 674. The Supreme Court identified additional situations in which a public entity's action necessarily facilitates the expression of some viewpoints to the exclusion of others. For example, "a university selecting a commencement speaker, a public institution selecting speakers for a lecture series, [and] a public school prescribing its curriculum...." *Id.*

[14]In these situations, heightened scrutiny "would risk implicating the courts in judgments that should be left to the exercise of journalistic discretion." *Id.* Scrutinizing a public station's discretionary decisions would be particularly problematic because "even principled exclusions rooted in sound journalistic judgment can often be characterized as viewpoint-based." *Id.*

In *United States v. American Library Ass'n*, the Supreme Court recognized that public libraries "must have broad discretion to decide what material

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[10] The ultimate holding in *Forbes*-that a public television station may exclude from a televised debate candidates who lacked adequate public support, but may not exclude candidates with viewpoints disfavored by the station-rested on a narrow exception presented by candidate debates, which are "by design" fora for political speech of exceptional significance. 523 U.S at 675.

to provide to their patrons." 539 U.S. at 204 (holding that libraries may reasonably refuse to provide patrons with pornography). In exercising their broad discretion, public libraries necessarily make content-based judgments. *Id.* ("[L]ibraries collect only those materials deemed to have requisite and appropriate quality.").[11] Therefore, public libraries may exclude materials based upon content. *Id.* at 208 ("The librarian's responsibility ... is to separate out the gold from the garbage, not preserve everything.").

In *National Endowment for the Arts v. Finley*, the Supreme Court held that a government agency could make aesthetic judgments in allocating competitive funding for art projects that demonstrated "excellence." 524 U.S. at 586. After all, determinations of "excellence" are "inherently content-based." *Id.* Because*1097 limited funding was allocated according to a competitive process, the Supreme Court specifically noted that reliance on *Rosenberger* was "misplaced." *Id.*

The distribution of grants in *Finley* is the closest parallel to the UC admissions process. In both scenarios, the government is providing a public benefit that is allocated to a limited number of

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[11] Further, the Supreme Court permitted public libraries to regulate Internet content even though it did not review and affirmatively approve or disapprove of each website. *Am. Library*, 539 U.S. at 208 ("A library's failure to make quality-based judgments about all the material it furnishes from the Web does not somehow taint the judgments it does make.").

persons through a competitive process.[12] Like the government agency that must judge the excellence of prospective art projects, UC must judge the excellence of prospective students who apply for a guaranteed spot at UC.

[15]It is undisputed that the content of an applicant's high school courses is an important factor in evaluating the merit of that applicant.[13] According to defense expert Dr. Michael Kirst,[14] the content of high school courses is a "crucial variable in predicting whether students will succeed at very selective post-secondary institutions such as the University of California." (Kirst Decl. Ex. A, at 2.) Plaintiffs' experts concur that it is "educationally reasonable" for Defendants to condition admittance on content and skill requirements. For example, Dr. Donald Erickson,[15] one of Plaintiffs' education experts, finds it reasonable for UC to expect admitted students to know, among other things, about "plants," "evolution," "accurate carbon dating," and "the roles of Latinos in United States history." (Lynch Decl. No. 1 Ex. 57.)

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[12] Both parties agree that students admitted to UC receive benefits, such as discounted in-state tuition and education from an excellent academic institution. (Pls.' MSJ 3.)

[13] The parties' real dispute concerns the academic merit of Plaintiffs' courses.

[14] Dr. Kirst is "a longtime professor of education at Stanford University and an authority on college-preparatory curricula and standards." (Defs.' MSJ 10; *see also* Kirst Decl. Ex. A, at 1.)

[15] Dr. Erickson retired from teaching after 30 years as a professor, 11 of those years with the University of California, Los Angeles (Erickson Decl. Ex. 1.)

Dr. Derek Keenan,[16] another of Plaintiffs' education experts, testified that "critical thinking and analysis skills are legitimate concerns of [UC] in evaluating student preparation." (Lynch Decl. No. 1 Ex. 63.) According to Dr. Keenan, "it's educationally appropriate for [UC] to set standards for the content and skills that need to be mastered for students to attend" (Keenan Dep. 46-47), and "high school course content is an important factor in student preparation for college work" (Keenan Dep. 47).

Still, Plaintiffs argue that *Forbes*, *American Library*, and *Finley* "do not apply to [UC] admissions decisions and do not apply to [UC's] rejections of private school courses," yet provide no principled reason to depart from the reasoning of these cases.

First, Plaintiffs argue that *Ashcroft v. ACLU*, 542 U.S. 656 (2004), in which a speech regulation was declared unconstitutional, essentially overruled *American Library*. To the contrary, the *Ashcroft* opinion cites *American Library* with approval. *Id.* at 669. Although both the *Ashcroft* **[16]**and *American Library* regulations concerned Internet speech, that is the sole similarity. The differences are instructive. The statute in *Ashcroft* criminalized private speech made in a context in which there is no need for content-based judgments. *Id.* at 660 ***1098** ("Content-based prohibitions, enforced by severe criminal penalties, have the constant potential to be

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[16] Plaintiffs did not provide an expert report or biography from Dr. Keenan, who serves as the Vice President of Academic Affairs for ACSI. *Becoming a Life-Changing Leader*, ACSI.org, https:// www. acsi. org/ webfiles/ webitems/ attachments/ 002914_ Bio. doc.

a repressive force in the lives and thoughts of a free people."). On the other hand, the regulations in *American Library* did not prohibit or criminally punish speech; they merely limited the speech that a public library made available to the public in a manner consistent with its duty to funnel limited resources toward the most beneficial materials. 539 U.S. at 208. The A-G Guidelines and Policies also do not prohibit or criminally punish speech, and the need to evaluate the excellence of each UC applicant requires content-based judgments.

Next, Plaintiffs argue that *Finley* "involved government ... regulation of its own grant standards, not private speech." (Pls.' Opp'n 26 n. 8.) Yet, the regulations that Plaintiffs challenge impact private speech in precisely the same manner as *Finley*. One could just as easily frame the A-G Guidelines and Policies as "government regulation of its own college admissions standards, not private speech." Both here and in *Finley*, the government evaluates, but does not prohibit, private speech in an effort to award benefits based upon a competitive process.

Finally, Plaintiffs futilely attempt to distinguish *Forbes* by incorrectly characterizing the decision as one involving "a public school prescribing its curriculum." (Pls.' Opp'n 26 n. 10.) *Forbes* did not involve a public school; it involved a public television station. 523 U.S. at 674. In *Forbes*, the Supreme Court analogized a public television station's selection of its programming to a public school's selection of its curriculum, recognizing that both scenarios require the government to make content-based evaluations of private speech. *Id.* The

importance of *Forbes* is not its specific factual scenario, but its general principles related to content-based judgments and the problems inherent in scrutinizing those discretionary judgments.

Accordingly, the A-G Guidelines and Policies must be analyzed under *Finley*, while heeding the Supreme Court's warning in *Forbes* that judicial forays into the exercise of discretion are problematic. Heightened scrutiny is inappropriate here. If the A-G Guidelines and Policies are rationally related to the goal of selecting the most qualified students for admission, they do not **[17]**violate the First Amendment's guarantee of free speech. *See Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 226 n. 12 (1985) ("Discretion to determine, on academic grounds, who may be admitted to study [is] one of 'the four essential freedoms' of a university.") (quoting *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 312 (1978)).

i. *The A-G Guidelines and Policies Must Be Rationally Related to UC's Educational Goal of Admitting Qualified Students.*

It is undisputed that UC can reasonably reject courses that either (1) fail to teach important topics with sufficient accuracy and depth of coverage or (2) fail to teach relevant analytical skills. Now, the Court must consider whether the contested A-G Guidelines and Policies reasonably apply this standard, both substantively and procedurally. Because the test of reasonableness "is not capable of precise definition or mechanical application," its proper application "requires careful attention to the

facts and circumstances of each particular case." *Graham v. Connor*, 490 U.S. 386, 396 (1989).

Still, the rational basis test is extremely deferential to the government and the states. Rational basis review "is not a license for courts to judge the wisdom, fairness, or logic" of government regulation.***1099** *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993); *see also City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) ("[T]he judiciary may not sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations."). Accordingly, government regulation is "accorded a strong presumption of validity." *Heller v. Doe*, 509 U.S. 312, 319 (1993). "[T]he burden is on the one attacking the [regulation] to negative every conceivable basis which might support it." *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973).

(a) *Are the A-G Guidelines and UC Position Statements Substantively Reasonable?*

Plaintiffs challenge the text of the A-G Guidelines and the following UC Position Statements:

(1) the UC Position Statement on Religion and Ethics Courses;

(2) the UC Position Statement on Science Courses; and

[18](3) the UC Position Statement on History and Social Science Courses.

(1) *UC Position Statement on Religion and Ethics Courses*

UC advises schools that, in order to receive A-G Subject credit, courses in religion or ethics should "treat the study of religion or ethics from the standpoint of scholarly inquiry rather than in a manner limited to one denomination or viewpoint" and "should not include among its primary goals the personal religious growth of the student." (Pls.' Ex. 243.)

Defendants have offered expert testimony from Professor Sharf [17] defending this policy. Professor Sharf explains that the UC policy reflects the scholarly approach taken in the discipline of religious studies. "One of the methodological foundations of the [discipline] is the ability to step back and gain intellectual and emotional distance from the subject matter. (Sharf Decl. Ex. A, at 3.) By focusing on their own personal religious growth, students lack the "basic critical skill" required for academic study of religion-the ability to take a more observer-independent view. (Sharf Decl. Ex. A, at 13.) Professor Sharf finds the Position Statement on Religion and Ethics Courses to be reasonable because "scholarly detachment is requisite for the unbiased analysis into the nature of religious phenomena." (Sharf Decl. Ex. A, at 4.)

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[17] Professor Sharf is the Director of Religious Studies at the University of California, Berkeley. (Sharf Decl. Ex. A, at 3-4.)

Plaintiffs provide no evidence that the Position Statement on Religion and Ethic Courses is facially unreasonable, submitting only deposition testimony from Professor Daniel Guevara.[18] While Professor Guevara opines that several rejected religion courses are "excellent" or "amazing" (Guevara Dep. 88, 93), he never challenges Professor Sharf's support for the Position Statement. Instead, Professor Guevara only claims "I don't see that [a goal of religious growth] would spoil" a course for UC approval. (Guevara Dep. 124.) This conclusion with no factual basis does not meet Plaintiffs' burden to show a genuine issue as to whether they can negate "every **[19]**conceivable basis which might support" the Position Statement. *See Lehnhausen*, 410 U.S. at 364. Other evidence submitted by Plaintiffs recognizes that "it ***1100** is crucial that the distinction between religious studies and theology-between teaching and preaching-be maintained in higher and secondary education." (Pls.' Ex. 414, at 141.) "It is important to draw a sharp distinction ... between studying a religion as an academic enterprise and thinking about the divine on behalf of one's religious community." (Pls.' Ex. 414, at 141.)

Accordingly, there is no genuine issue of material fact as to this issue. The UC Position Statement on Religion and Ethics Courses is reasonable.

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[18] Plaintiffs did not provide an expert report or biography from Professor Guevara, who teaches philosophy at the University of California, Santa Cruz. *See UCSC Philosophy Department People*, UC Santa Cruz, http:// philosophy. ucsc. edu/ people.html.

(2) *UC Position Statements on Science and History Courses*

Plaintiffs base their claims against the UC Position Statements on Science and History Courses on the false assertion that these Position Statements require a secular curriculum without religious viewpoints. (Pls.' MSJ 11 ("In other words, there *must* be a 'secular history curriculum' without religious viewpoints."), 16 ("The [Science] Position Statement also means that *only* a 'secular science curriculum' (no religious viewpoint added) is approved.").) Yet, the Position Statements do not use the word "must"; rather, they use the word "can" (Pls.' Exs. 241-42), indicating that a "secular" curriculum is not mandatory for approval. Indeed, as discussed in Part II.A, Defendants have approved numerous science and history courses that incorporate religious viewpoints.

The rest of the Position Statements reinforce the purpose of the A-G Guidelines: Admitted students must attain "essential critical thinking and study skills," "the necessary preparation for courses, majors, and programs offered at [UC]," and "a body of knowledge that will provide breadth and perspective to new, more advanced studies." (Pls.' Exs. 241-42.)

There is no genuine issue of material fact as to this issue. The UC Position Statements on Science and History Courses are reasonable.

(b) *Are the Reviewers Qualified?*

Plaintiffs insinuate that the UC employees charged with reviewing high school courses are not sufficiently qualified to implement the A-G Guidelines and Policies. According to Plaintiffs, **[20]**"[course] review is by staff reviewers in the Office of the President, who with one exception have only college degrees and not more than a single college course in each subject.[19] UC's review is not by faculty members except in rare cases when they are sent a questioned course." (Pls.' MSJ 2.)

Defendants counter that each reviewer is provided with guidance for course review decisions, such as "subject matter descriptions, interpretive notes elaborating on these descriptions, [examples] of approved courses, competency standards and more." (Defs.' Opp'n 25 (citing Lynch Decl. No. 1 Ex. 2).) Further, UC reviewers can and do obtain additional guidance by consulting with other UC employees with specialized subject-area knowledge, including faculty. (Hargrove Decl. ¶¶ 3, 6 ("UC faculty members with PhDs review courses and textbooks about which staff reviewers have questions."); Lynch Decl. No. 2 Ex. 92.) In addition, Defendants contest Plaintiffs' allegation that course reviewers have limited educations, noting that "[s]ome of the UC staff reviewers also have post-bachelor's degrees, and most of the staff reviewers

[19] As support for this allegation, Plaintiffs cite only the deposition transcripts of two reviewers, Nina Costales and Jeanne Hargrove. Yet, Costales testified that she received about one year of graduate studies in education, and more than one class in English. (Costales Dep. 26-29.) Hargrove also testified that she took more than one class in history, English, and possibly government. (Hargrove Dep. 14-17).

have had more than *1101 one college course in the subjects reviewed." (Hargrove Decl. ¶ 6.)

There is no genuine issue of material fact here. The course reviewers are reasonably guided and qualified to make course approval determinations.

(c) *Is the UC Course Review Process Unreasonably "Probabilistic"?*

Plaintiffs complain that the UC course review process is "only 'probabilistic,' approving some poor courses where students do not learn and rejecting some good courses where students do learn." (Pls.' MSJ 2.) "Because UC reviews only course descriptions, it cannot know how a teacher will teach a course; a bad outline could be taught well, or a good outline could be taught poorly." (Pls.' MSJ 2.)

[21]UC admits the probabilistic nature of its course review process. (Defs.' Opp'n 6 ("Given the impracticability of observing all classes, the course review process is necessarily 'probabilistic' ...."); Tr. Hr'g 62 ("There's no certainty to [the course review process], ... but all of the experts agree that it's a reasonable way to do it.").)

Under the deferential rational basis standard "courts are compelled ... to accept [the government's] generalizations even when there is an imperfect fit between means and ends." *Heller*, 509 U.S. at 321. The government may act if there is "a rational basis for doing so ..., even if it 'is probably not true' that those reasons are valid in the majority of cases." *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 86 (2000).

A regulation does not fail rational-basis review because it " 'is not made with mathematical nicety or because in practice it results in some inequality.' " *Dandridge v. Williams*, 397 U.S. 471, 485 (1970) (quoting *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78 (1911)). "The problems of government are practical ones and may justify, if they do not require, rough accommodations-illogical, it may be, and unscientific." *Metropolis Theatre Co. v. Chicago*, 228 U.S. 61, 69-70 (1913).

Here, there is no dispute that it is reasonable for UC to ensure that its admitted students took courses likely to have prepared them adequately for academic study. (Kirst Decl. Ex. A, at 1 ("Studies have found that the most important college preparation is the acquisition of sufficient content and critical thinking skills in high school courses."); Erickson Dep. 51-52 ("[UC has the right to determine] what content students should know before they come to UC."); Keenan Dep. 47 ("[C]ritical thinking and analysis skills are legitimate concerns of [UC] in evaluating student preparation.").) In addition, both parties agree it is better for UC to have more information about applicants than less, and that course descriptions give UC more information about course content than titles alone.

UC "relies upon an adequate syllabus (prepared by the teacher) as an indicator that the course will adequately prepare students, and a poor syllabus (again, prepared by the teacher) as an indicator to the contrary." (Defs.' Opp'n 6 (citing Lynch Decl. No. 2 Ex. 93).) Although this process is not certain, it is

reasonable. (*See* Kirst Decl. Ex. A, at 10 (concluding that the UC **[22]**course review process "is a reasonable and effective way to bridge the gap between high school and college").)

There is no genuine issue of material fact here. The UC course review process is not unreasonably probabilistic.

(d) *Is Reviewing Only California High School Courses Reasonable?*

Plaintiffs claim that the unreasonableness of the A-G Guidelines and Policies are evident in Defendants' failure to require out-of-state applicants to take UC-***1102** approved courses. (Pls.' MSJ 3.) To the contrary, it is reasonable for UC to limit its course review on California schools. Graduates of California high schools make up more than ninety percent of UC applicants. (Wilbur Decl. No. 1 ¶ 4.) "It would be unreasonably burdensome to expect UC to review courses from all schools in the United States." (Defs.' Opp'n 6.) Just because UC does not make individualized determinations where it would not be feasible to do so, does not discredit the determinations UC does make. *See Am. Library*, 539 U.S. at 208 (noting that a public library's inability to evaluate all Internet content does not diminish its discretion to evaluate other materials).

There is no genuine issue of material fact here. It is reasonable for UC to require approval for California high school courses, but not for out-of-state high schools.

Accordingly, the A-G Guidelines and Policies survive rational basis review.[20]

[23]ii. *Defendants Cannot Implement Regulations Because of Animus Toward Religion. Even If Those Regulations Are Rationally Related to UC's Educational Purpose.*

Even if the A-G Guidelines and Policies are rationally related to UC's educational purpose, Plaintiffs can still prevail if they demonstrate that the regulations are the result of government animus towards religious viewpoints. [21] In *Finley*, the Supreme Court repeatedly emphasized that the government may not punish disfavored viewpoints

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[20] Plaintiffs also argue that the course review process is unreasonable because UC "has no data showing [that added religious content] interfere[s]" with teaching required content. (Pls.' Reply 7.) Government action "may be based on rational speculation unsupported by evidence or empirical data." *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 315 (1993). As discussed in Part II.B.1.a.i.(a), the theoretical support for the UC course review process demonstrates its rationality. (*See also* Defs.' Opp'n 14 n. 20 ("It is reasonable for UC to set its admissions standards based on the considered judgment of its own faculty, even without quantitative evidence, and Plaintiffs cite no authority to the contrary.").) In addition, UC notes that empirical data "would not be feasible ..." (Defs.' Opp'n 13-14 n. 20.)

[21] This discriminatory intent analysis is not universally accepted, *Lukumi*, 508 U.S. 520, 558 (1993) (Scalia, J., concurring) ("[The First Amendment] does not put us in the business of invalidating laws by reason of the evil motives of their authors."), but has garnered favor with a majority of the Supreme Court., *id.* at 500 (Kennedy, J.) ("Legislators may not devise mechanisms, overt or disguised, designed to persecute or oppress a religion or its practices.").

under the guise of legitimate regulations. 524 U.S. at 587 ("[T]he Government may not 'aim at the suppression of dangerous ideas'....") (quoting *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 550 (1983)); *id.* ("[A] more pressing constitutional question would arise if government [regulation was] calculated to drive 'certain ideas or viewpoints from the marketplace.' ") (quoting *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991)); *id.* ("If the [government] were to leverage its power to [regulate speech] into a penalty on disfavored viewpoints, then we would confront a different case.").

Although there is no guidance from the Ninth Circuit or the Supreme Court regarding government animus in the specific arena of free speech, two Supreme Court decisions have addressed the issue in the context of the Free Exercise Clause: *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), and ***1103** *Locke v. Davey*, 540 U.S. 712 (2004).

In *Lukumi*, the plaintiffs challenged a city ordinance that targeted the Santeria religion under the guise of a legitimate regulation on animal slaughter. 508 U.S. 520. Leaning on "the principle that the First Amendment forbids an official purpose to disapprove of a particular religion or of religion in general," the Supreme Court invalidated the ordinance because it was not neutral and it was not a law of general applicability. *Id.* at 532.

[24]In *Locke*, the plaintiff challenged a state scholarship program that was available to all

qualifying college students except for those "pursuing a degree in theology." 540 U.S. at 716. Over Justice Scalia's vigorous dissent, the Supreme Court extended the *Lukumi* test to require an element of animus, even if the government regulation was not neutral. *Id.* at 724 ("Far from evincing the hostility toward religion which was manifest in *Lukumi,* [the scholarship program] goes a long way toward including religion in its benefits."); *see also id.* at 731 (Scalia, J., dissenting) ("The Court makes no serious attempt to defend the program's neutrality...."). Requiring strict scrutiny solely because a government regulation was not neutral "would extend the *Lukumi* line of cases well beyond not only their facts but their reasoning." *Id.* at 720.

Although decided under the Free Exercise Clause, *Lukumi* and *Locke* guide this Court's analysis of Plaintiffs' claim under the Free Speech Clause. [22] The animus requirement is equally applicable whether the government is punishing disfavored viewpoints or disfavored religious practices. In this case, importing the test used in free exercise cases is particularly appropriate because Plaintiffs complain of discrimination against religious speech.[23] *Cf. Capitol Square Review &*

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[22] Plaintiffs themselves contend that *Lukumi* is the proper framework for determining whether the purpose of a law is to restrict practices because of their religious motivation. (Pls.' Opp'n 17 (comparing UC to the city council in *Lukumi*).)

[23] Indeed, government regulation of religious speech has been challenged under the Free Exercise Clause. *See, e.g., Am. Family Ass'n v. City & County of San Francisco,* 277 F.3d 1114 (9th Cir.2002).

Advisory Bd. v. Pinette, 515 U.S. 753, 767 (1995) (observing that "private religious expression receives preferential treatment under the Free Exercise Clause"); *Widmar v. Vincent*, 454 U.S. 263 (1981) (invalidating restrictions on religious speech under both the Free Speech and Free Exercise Clauses).

Here, the A-G Guidelines and Policies are more like the scholarship program in *Locke* than the criminal prohibition in *Lukumi*. In *Locke*, the Supreme Court noted that the challenged scholarship program was distinguishable from the invalidated criminal statute in *Lukumi* in three fundamental ways. First, the scholarship program imposed a "far milder" burden on religion. 540 U.S. at 720. Second, the scholarship program went "a long way" to include religion. *Id.* at 724. **[25]**Finally, the history of the ordinance did not reveal animus toward religion. *Id.* at 725. The Supreme Court upheld the scholarship program even though it expressly discriminated against theology majors.

The A-G Guidelines and Policies share the same critical distinctions found in *Locke*. First, any burden on religious schools or their students is mild, particularly when compared to the heavy criminal ***1104** penalties at stake in *Lukumi*. UC does not penalize students for taking non-approved courses or attending schools that teach non-approved courses. Should a student attend a religious school that does not offer approved courses in the A-G Subjects, that student may demonstrate proficiency in a number of alternative ways.

Second, UC "goes a long way" to accommodate religious school students. Defendants offer students alternative ways of demonstrating proficiency in the A-G Subjects (*see* Part I.A) and offer religious schools personalized assistance in creating curriculums that would earn approval. (Pls.' Ex. 240 (UC Position Statement) ("[UC] is happy to provide additional assistance to high schools, including Christian schools, through a collaborative consultation process, in order to help the schools create course outlines that meet the faculty's 'a-g' course requirements.").)

Finally, there is little in the history of the A-G Guidelines and Policies to demonstrate that Defendants were motivated by an improper purpose. Plaintiffs' best evidence of animus is their characterization of the deposition testimony from the former chair of the UC board responsible for the A-G Guidelines and Policies, Michael Brown, that the "subtext" of Defendants' discussion in adopting the UC Position Statement on science was "antagonism toward the Christian schools," and that religious schools' "right wing perspectives were highly objectionable." [24]

Brown's actual deposition testimony was as follows:

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[24] At oral argument, Plaintiffs conceded that "[w]e do not intend to argue the case based on proving animus." (Tr. Hr'g 39; *see also* Tr. Hr'g 40 ("[W]e have cited in our brief the primary evidence that would support a finding of animus. We are not doing so to argue animus.").)

Q: Did the emotional tenor of any others on the BOARS committee in your view reflect antagonism toward the Christian schools or what they taught?

[26]A: It was my assessment that that was the subtext. It wasn't that anybody ever said they're Christian schools, we ain't approving them, but I had the sense that their feelings about radical or fundamentalist ... right wing perspectives were highly objectionable.

(Brown Dep. 143-44.)

Even construing this evidence in the light most favorable to Plaintiffs, Brown's testimony is insufficient to create a genuine issue of material fact. Brown's "assessment" and "sense" that the committee was antagonistic is of little value without concrete factual support. In addition, the power of Plaintiffs' quotation is tempered by their omission of the words "radical" and "fundamentalist." These adjectives suggest the Board's "feelings" concerned extreme views inconsistent with knowledge generally accepted in the relevant academic community rather than antagonism toward religion. Further, Brown admitted in his deposition that his "assessment" did not apply to the entire board. (Brown Dep. 144 ("Most [board members] were quiet.... Trying to, in my view, reason it out.... I was actually honored by that. I really appreciated being in that context to see [board members] trying to grapple with it.").) An email Brown sent to the board after the allegedly antagonistic discussion confirms his appreciation: "I remain deeply appreciative of the tenor of [the] discussion ... regarding the issue of

approving science courses ... submitted from 'Christian' schools.... I thought the [board members] participated in a frank, thoughtful, and sensitive manner." (Pls.' Ex. 157.)

***1105** These facts stand in stark contrast to those in *Lukumi*, where the animus was "manifest." See *Locke*, 540 U.S. at 724. There, "the record ... compel[ed] the conclusion that suppression of the central element of the Santeria worship service was the object of the [city] ordinance." 508 U.S. at 534. First, the penalties were stiff. Violators of the ordinance could be imprisoned for up to sixty days and fined up to $500. *Id.* at 528. Second, the ordinances were aimed at "one of the principal forms of devotion" in the Santeria worship, animal sacrifice. *Id.* at 524. Finally, "[t]he burden of the ordinance, in practical terms, [fell] on Santeria adherents but almost no others." *Lukumi*, 508 U.S. at 536. The city had made no attempt to address the issue of animal killing until after a Santeria church announced its plans to open within the city. *Id.* at 541. Taped excerpts of **[27]**a city meeting at which the issue was addressed "evidence[d] significant hostility [from] residents, members of the city council, and other city officials toward the Santeria religion." *Id.*

A few examples of the comments in *Lukumi* provide a sharp distinction from Brown's "sense" of antagonism: Crowd members cheered statements made by council members that were critical of Santeria and taunted members of the Santeria church. *Id.* One councilman said that Santeria devotees "are in violation of everything this country

stands for" and another asked "[w]hat can we do to prevent the Church from opening?" *Id.* A city official told the city council that Santeria was a sin, "foolishness," "an abomination to the Lord," and the worship of "demons" and urged the city council "not to permit this Church to exist." *Id.* at 541-42. Also, the city attorney commented that the ordinance indicated that "[t]his community will not tolerate religious practices which are abhorrent to its citizens." *Id.* at 542.

Given the Supreme Court's caution against extending *Lukumi* too far beyond its facts, *Locke*, 540 U.S. at 720, there is no genuine issue of material fact as to this issue. Defendants were not motivated by animus in setting the A-G Guidelines and Policies.

b. *Overbreadth*

Plaintiffs argue that the UC course review process is facially overbroad under the Free Speech Clause. The overbreadth doctrine is an "exception from general standing rules" that allows a plaintiff to seek facial invalidation of a law that "sweeps too broadly, penalizing a substantial amount of speech that is constitutionally protected," even if that law is constitutional as applied to the plaintiff. *Forsyth County*, 505 U.S. at 129-30. This doctrine recognizes that "the very existence of some broadly written laws has the potential to chill the expressive activity of others not before the court." *Id.* at 129.

To succeed on their overbreadth claim,[25] Plaintiffs must show that the A-G Guidelines and Policies "punish a 'substantial' amount of protected free speech, 'judged in relation to the statute's [28]plainly legitimate sweep.' " *Virginia v. Hicks*, 539 U.S. 113, 118-19 (2003) (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973)).

For support, Plaintiffs rely heavily on the erroneous assumption that Defendants*1106 have a policy of rejecting all courses that add a religious viewpoint. Indeed, that policy (if it existed) would likely cause Defendants to incorrectly reject a large number of courses that meet UC's academic standards.[26] However, the face of the A-G Guidelines and Policies consistently stress that courses must prepare students for college, a legitimate goal of the state. Plaintiffs have provided little evidence that any course (let alone a substantial number) technically falls under the text of the A-G Guidelines and Policies, but nevertheless prepares students for college. Rather, Plaintiffs' evidence, at best, alleges that Defendants incorrectly apply the A-G Guidelines and Policies to Plaintiffs' courses because those courses do teach students the knowledge and skills necessary for college.[27]

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[25] Plaintiffs ignore their overbreadth claim in their Motion, but address it in response to Defendants' Motion.

[26] Because this policy does not exist (*see* Part II.A), the Court will not determine whether the amount of speech that would have been rejected under Plaintiffs' hypothetical policy is "substantial" enough to warrant facial invalidation.

[27] Also persuasive is that high schools are not additionally punished for submitting a rejected course. Unlike speakers who may not be willing to test the constitutionality of a law that

There is no genuine issue of material fact as to this issue. The A-G Guidelines and Policies are not overbroad.

c. *Unbridled Discretion*

Plaintiffs argue that the UC course review process is facially unconstitutional under the Free Speech Clause because the course reviewers exercise "unbridled discretion" to grant or deny course approval. (Pls.' MSJ 26 ("The long-settled rule is that 'unbridled discretion in the hands of a government official or agency constitutes a prior restraint' on freedom of expression.") (quoting *Lakewood*, 486 U.S. at 757).) Defendants argue that an "unbridled discretion" challenge is only available in the context of a licensing statute or other prior restraint and therefore does not apply to the A-G Guidelines and Policies. (Defs.' Opp'n 24-25.)

[29]i. *Plaintiffs Cannot Challenge the A-G Guidelines and Policies Under the "Unbridled Discretion" Doctrine.*

The Supreme Court has expressly noted that whether regulations other than licensing schemes are subject to the "unbridled discretion" analysis is an open question. *Ward*, 491 U.S. at 794 ("Since [the plaintiff] does not claim that city officials enjoy unguided discretion to deny the right to speak

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could put them in jail-one of the reasons the overbreadth doctrine exists-high schools are in the same position after a course is rejected as before. All that is lost is the time the school employees spent putting together the course description.

altogether, it is open to question whether [the plaintiff's] claim falls within the narrow class of permissible facial challenges to allegedly unconstrained grants of regulatory authority."). In *Ward*, the Supreme Court side-stepped this threshold question, finding that even if the plaintiff could bring an unbridled discretion challenge, it would fail. *Id.*

Still, the majority in *Ward* strongly suggested that regulations other than prior restraints should not be subject to the "extraordinary doctrine" that permits facial challenges on the grounds of overly broad discretion. *Id.* at 793-94. "[T]he regulations we have found invalid as prior restraints have 'had this in common: they gave public officials the power to deny use of a forum in advance of actual expression.' " *Id.* at 795 n. 5 (quoting *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 553 (1975)).

Noting that the city regulation at issue "is of an entirely different, and less, order of magnitude" than regulations that could *1107 deny a speaker the ability to speak, the Supreme Court observed that its prior cases permitting an unbridled discretion challenge "have generally involved licensing schemes that Ves[t] unbridled discretion in a government official over whether to permit or deny expressive activity.' " *Id.* at 793-94 (quoting *Lakewood*, 486 U.S. at 755). "The relevant question is whether the challenged regulation authorizes suppression of speech in advance of its expression, and the [challenged regulation] does not." *Id.* at 795 n. 5.

Likewise, the A-G Guidelines and Policies do not forbid expressive activity. Religious schools may teach any course and their students may take any course without penalty.

Plaintiffs cite *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973), for the proposition that "unbridled discretion" may invalidate regulations other than licensing. Plaintiffs assert that the "Supreme Court says the unchecked discretion over speech *is* the prior restraint...." (Pls.' Reply **[30]**10.) For support, Plaintiffs rely on dicta [28] from *Broadrick* that unbridled discretion challenges are permitted where "[expressive or communicative] conduct has required official approval under laws that delegated standardless discretionary power to local functionaries, resulting in virtually unreviewable prior restraints on First Amendment rights." 413 U.S. at 613.

Plaintiffs' argument is misplaced. *Broadrick* singles out expressive activity that "required official approval." *Id.* It follows, then, that *Broadrick* contemplates situations in which the government holds the power to prevent the speech before it even begins. Such a restriction meets the very definition

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[28] The Court emphasizes that Plaintiffs' quote is irrelevant to the Supreme Court's decision in *Broadrick*. The *Broadrick* plaintiffs did not challenge the statute under the unbridled discretion doctrine. Nor did the Supreme Court perform an unbridled discretion analysis. Rather, the Supreme Court identified the unbridled discretion doctrine as one of the "limited exceptions" to the general standing requirement, which usually allows plaintiffs to challenge only regulations that are unconstitutional as applied to them. *Broadrick*, 413 U.S. at 610.

of a prior restraint. This conclusion is supported by the *Broadrick* passage from which Plaintiffs selectively quote; it discusses prior restraints. The statute at issue in *Broadrick* was a prior restraint that prohibited state employees from engaging in certain political speech. *Id.* at 602. Moreover, the four cases the Supreme Court cites in support of Plaintiffs' selective quotation from the *Broadrick* opinion all involved licensing statutes. *Id.* at 613 (citing *Shuttlesworth v. Birmingham*, 394 U.S. 147 (1969) (invalidating a statute that criminalized publicly demonstrating without a permit), *Cox v. Louisiana*, 379 U.S. 536 (1965) (reversing a criminal conviction for obstructing traffic when publicly demonstrating without prior approval from city officials), *Kunz v. New York*, 340 U.S. 290 (1951) (invalidating a statute that criminalized holding a religious meeting without a permit), and *Lovell v. City of Griffin*, 303 U.S. 444 (1938) (invalidating a statute that criminalized distributing pamphlets without a permit)).

The correct interpretation of Plaintiffs' *Broadrick* quote is not that standardless discretionary power creates a prior restraint, but that standardless discretionary power makes existing prior restraints "virtually unreviewable."

Accordingly, Plaintiffs cannot challenge the A-G Guidelines and Policies under the ***1108** "extraordinary doctrine" that prohibits unbridled discretion.

[31]ii. *Even If Permitted, Plaintiffs' "Unbridled Discretion" Challenge Would Fail.*

Laws invalidated under the "unbridled discretion" doctrine gave city officials "unbounded discretion to grant or deny a permit application and to place unlimited additional terms and conditions on any permit that was issue [d]." *Lakewood*, 486 U.S. at 755 ("It is apparent that the face of the ordinance itself contains no explicit limits on the mayor's discretion."). Likewise, in *Saia v. New York*, there were "no standards" to guide the police chiefs discretion. 334 U.S. 558, 560 (1948).

In contrast, UC course reviewers are given "subject matter descriptions, interpretive notes elaborating on these descriptions, [examples] of approved courses, competency standards and more." (Defs.' Opp'n 25 (citing Lynch Decl. No. 1 Ex. 2).) Further, UC reviewers can obtain additional guidance by consulting with other UC employees with specialized subject-area knowledge, including faculty. (Rashid Decl. No. 1 ¶ 6; Hargrove Decl. ¶ 3; Lynch Decl. No. 2 Ex. 92.)

There is no genuine issue of material fact as to this issue. Defendants have sufficient guidance to defeat a challenge of unbridled discretion.

Defendants are entitled to summary judgment on Plaintiffs' unbridled discretion claim.

2. *Free Exercise and Establishment Clauses*

Plaintiffs allege that the A-G Guidelines and Policies: (1) exhibit hostility toward religious schools, in violation of the Free Exercise Clause and

Establishment Clause; and (2) prescribe what shall be orthodox in religion, in violation of the Free Exercise Clause.

a. *Hostility Toward Religious Schools*

Plaintiffs allege that the A-G Guidelines and Policies are "hostile" towards religious schools on their face.[29] Again, the parties disagree on which test governs Defendants' alleged conduct. Plaintiffs provide no test at all in their opening brief, stating only that "hostility towards religion" is **[32]**forbidden. (Pls.' MSJ 24 (citing *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984)).) Plaintiffs' Complaint contends that "hostility to religion" violates the Establishment Clause. Defendants argue in their Opposition that "claims of hostility should be evaluated under the Free Exercise Clause, not the Establishment Clause." (Defs.' Opp'n 28 (citing Lukumi, 508 U.S. at 532).)

In the Ninth Circuit, both the Establishment Clause and Free Exercise Clause govern claims of hostility to religion, depending on the nature of the hostility. Claims of hostility in the form of symbolic disapproval of religion are evaluated under the Establishment Clause. *See Am. Family Ass'n v. City & County of San Francisco*, 277 F.3d 1114, 1120-21 (9th Cir.2002). [30] Claims of hostility in the ***1109**

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[29] Plaintiffs also include a laundry list of allegedly hostile actions that are not covered by their facial claims. These allegations are addressed in Part II.C.2.

[30] In *American Family*, the Ninth Circuit determined that a hostility claim under the Free Exercise Clause could only survive if the plaintiff alleged "specific religious conduct that

form of laws that burden a plaintiff's ability to practice his religion are evaluated under the Free Exercise Clause. *Lukumi*, 508 U.S. at 532; *see also Locke*, 540 U.S. 712.

Here, the A-G Guidelines and Policies could fall under either clause, depending on how the evidence is viewed. In the light most favorable to Defendants, the course-review process at worst symbolically disapproves of the academic value of Plaintiffs' beliefs. In the light most favorable to Plaintiffs, the course-review process burdens students who must take additional tests to demonstrate proficiency in the A-G Subjects.

i. *Symbolic Hostility Under the Establishment Clause*

Although Establishment Clause claims typically challenge government action that allegedly benefits religion, the clause also governs "a claim brought under a hostility to religion theory." *Am. Family*, 277 F.3d at 1121; *see also Vernon v. City of Los Angeles*, 27 F.3d 1385, 1396 (9th Cir.1994) ("The government neutrality required under the Establishment Clause is ... violated as much by government disapproval of religion as it is by government approval of religion.").

"Notwithstanding its 'checkered career,' *Lemon v. Kurtzman*, 403 U.S. 602 (1971), continues to set

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was affected by the [government's] actions." 277 F.3d at 1124. Because symbolic disapproval does not, by definition, burden religious conduct, any Free Exercise Claim based on symbolic disapproval fails. *Id.* ("[A]lleging a subjective chilling effect on free exercise rights is not sufficient to constitute a substantial burden.").

forth the applicable constitutional standard for assessing governmental actions **[33]**challenged under the Establishment Clause." *Vasquez v. Los Angeles County*, 487 F.3d 1246, 1254 (9th Cir.2007) (quoting *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 319 (2000) (Rehnquist, C.J., dissenting)). Under *Lemon*, government action does not violate the Establishment Clause if it: (1) has a secular purpose, (2) has a primarily secular effect; and (3) does not excessively entangle the government with religion. 403 U.S. at 612-13.

(a) *Secular Purpose*

Government action "will stumble on the purpose prong 'only if it is motivated wholly by [the] impermissible purpose' " of endorsing or disapproving religion. *Kreisner v. City of San Diego*, 1 F.3d 775, 782 (1993) (quoting *Bowen v. Kendrick*, 487 U.S. 589, 602 (1988)). The Court must focus "solely on purpose" and cannot "question the propriety of the means to achieve that purpose or whether the defendants were correct or even reasonable in the assumptions underlying their actions...." *Am. Family*, 277 F.3d at 1121. In addition, the court "must be 'reluctant to attribute unconstitutional motives' to government actors in the face of a plausible secular purpose." *Kreisner*, 1 F.3d at 782 (quoting *Mueller v. Allen*, 463 U.S. 388, 394-95 (1983)).

Here, a secular purpose is plainly evident. UC aims to admit the most qualified students and ensure that those students have the knowledge and skills necessary to succeed at UC.

(b) *Secular Effect*

Under the effect prong of the *Lemon* test, the Court must determine whether, from the perspective of an informed and reasonable observer, the government's action has "the principal or primary effect of advancing or inhibiting religion." *Am. Family*, 277 F.3d at 1122.

Here, a reasonable person would not find the primary effect of the UC course review process to be inhibition of religion. UC approves many courses that include religious perspectives or are submitted by *1110 religious schools. Additionally, an informed observer would be aware of the controversial nature of intelligent design and creation as scientific beliefs. *See Kitzmiller v. Dover Area School District*, 400 F.Supp.2d 707, 764 (E.D.Pa.2005); *McLean v. Ark. Bd. of Educ.*, 529 F.Supp. 1255, 1259 (E.D.Ark.1982) (dismissing "creation science" as "simply not a science"). No reasonable and informed observer could conclude that refusing to recognize intelligent design as science or other religious beliefs as academics has the primary effect of inhibiting religion.

[34]Therefore, Defendants meet the secular effect prong of the *Lemon* test.

(c) *Excessive Entanglement*

Plaintiffs contend that government evaluations of religious content excessively entangle the government with religion. (Pls.' MSJ 26.) This argument is undermined by two Supreme Court

cases in which public schools argued that they must exclude religious speech because allowing the speech would result in excessive entanglement. *See Bd. of Educ. v. Mergens*, 496 U.S. 226, 253 (1990) (invalidating a public high school policy excluding religious after school clubs); *Widmar*, 454 U.S. 263 (invalidating a state university policy prohibiting the use of buildings or grounds for religious worship). In both cases, the Supreme Court recognized that excluding religious speech posed a *greater* risk of "entanglement" because the public schools would have to determine what words and activities fell within the prohibited categories of religious worship and religious teaching. *Widmar*, 454 U.S. at 272 n. 11; *see also Mergens*, 496 U.S. at 253 ("[D]enial of equal access to religious speech might well create greater entanglement problems in the form of invasive monitoring to prevent religious speech....").

While "invasive monitoring" designed to root out religious speech may constitute impermissible entanglement, application of the A-G Guidelines and Policies to private schools does not implicate this potentially unconstitutional consequence. First, these regulations do not require Defendants to identify religious speech. Rather, Defendants are charged with determining what content and skills are necessary for college preparation, and whether high school courses adequately teach the necessary content and skills.

Second, there is no invasive monitoring. *See Widmar*, 454 U.S. at 272 n. 11 ("There would also be a continuing need to monitor group meetings to ensure compliance with the rule."). Religious schools

seeking course approval need only submit a course description to UC. Defendants do not monitor classroom instruction to ensure that students are taught the approved content. The A-G Guidelines and Policies do not excessively entangle the government with religion.

There is no genuine issue of material fact here. Defendants are entitled to judgment as a matter of law on Plaintiffs' facial Establishment Clause claim.

[35]ii. *Burdensome Hostility Under the Free Exercise Clause*

Plaintiffs also argue that the UC course review process violates the Free Exercise Clause because UC imposes a substantial burden on religious school students' right to practice their religion. The analysis under the Free Exercise Clause has changed drastically over the past twenty years. Formerly, *Sherbert v. Verner*, 374 U.S. 398 (1963), governed Free Exercise claims. Under *Sherbert*, any government conduct or regulation that substantially burdened a religious practice was unconstitutional unless it was narrowly tailored to achieve a compelling state interest. 374 U.S. at 402-03. The ***1111** government's burden was high. *Id.* at 407. ("[I]n this highly sensitive constitutional area, 'only the gravest abuses, endangering paramount interests, give occasion for permissible limitation.' ") (quoting *Thomas v. Collins*, 323 U.S. 516, 530 (1945)).

In 1990, the Supreme Court radically changed course, effectively overruling *Sherbert* in *Department*

of Human Resources of Oregon v. Smith, 494 U.S. 872 (1990). Under *Smith*, if prohibiting the exercise of religion is not the object of the law, but merely the incidental effect of a generally applicable law, then there is no Free Exercise violation.[31] *Id.* at 884 ("To make an individual's obligation to obey [otherwise valid laws of general application] contingent upon the law's coincidence with his religious beliefs, except where the State's interest is 'compelling' ... contradicts both constitutional tradition and common sense."). The *Smith* Court held that the Free Exercise Clause does not require a case-by-case assessment of the religious burdens imposed by facially constitutional laws. *Id.* at 883-90.

In *Lukumi*, the Supreme Court clarified its holding in *Smith*, observing that a free exercise violation would exist if the plaintiff showed that the challenged law is either not neutral or not generally applicable. 508 U.S. at 531-34. Finally, in *Locke*, the Supreme Court went a step further. Under *Locke*, the law must be the product of animosity toward religion. 540 U.S. at 724.

[36]Because Plaintiffs' free exercise claim is subject to the same test as their free speech claim-the regulations must be rationally related to a

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[31] In response to *Smith*, Congress enacted the Religious Freedom Restoration Act ("RFRA"), which required strict scrutiny for laws that "substantially burdened" a person's ability to practice their religious beliefs. *See* 42 U.S.C. § 2000bb-1. Finding that Congress had exceeded its power, the Supreme Court declared RFRA to be unconstitutional when applied to state and local regulations. *See City of Boerne v. Flores*, 521 U.S. 507, 516 (1997).

legitimate state interest and not motivated by animus-the results are identical as well. As discussed in Part II.B.1.a.ii, the A-G Guidelines and Policies are closer to the civil regulation in *Locke* than the criminal prohibition in *Lukumi* because of the relatively mild burden placed on religious schools and their students, Defendants' attempts to accommodate religion, and the lack of evidence concerning animus.

Accordingly, there is no genuine issue of material fact as to animus or the reasonableness of the A-G Guidelines and Policies under the Free Exercise Clause.

b. *Prescription of Orthodoxy*

Plaintiffs selectively quote Supreme Court precedent as the basis for a cause of action in bringing their claim that the A-G Guidelines and Policies "prescribe what shall be orthodox in ... religion." (Pls.' MSJ 23 (quoting *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943)).) In *American Family*, the plaintiff brought a claim against the government for "prescrib[ing] an orthodoxy of belief on the subject of homosexuality." 277 F.3d at 1124. The Ninth Circuit noted that the "dozens of cases" supporting the "principle that the government cannot prescribe matters of opinion or belief" involved compelled speech. *Id.* As discussed above, the A-G Guidelines and Policies do not compel or prohibit speech. Religious schools are free to teach any belief system they choose.

There is no genuine issue of material fact here. Defendants are entitled to summary*1112 judgment on Plaintiffs' "prescription" claim.

3. *Equal Protection Clause*

As an alternative basis for relief, Plaintiffs argue that the A-G Guidelines and Policies violate the Equal Protection Clause by discriminating against religious schools.[32] (Pls.' Reply 10.) As to claims of religious discrimination, if the defendant's actions do not violate the Free Exercise [37]Clause, then courts will apply only rational basis scrutiny to equal protection claims based on religion. *Locke*, 540 U.S. at 720 n. 3 ("Because we hold that the program is not a violation of the Free Exercise Clause, ... we apply rational basis scrutiny to [the plaintiffs] equal protection claims."); *see also Johnson v. Robison*, 415 U.S. 361, 375 n. 14 (1974) (applying "the traditional rational-basis test" to an equal protection claim premised on religious discrimination that did not violate the Free Exercise Clause).

As discussed in Part II.B.1.a.i, there is no genuine issue of material fact as to whether the UC

[32] Plaintiffs analogize their claims to those in *Regents v. Bakke*, 438 U.S. 265 (1978), where "it violated equal protection to render Caucasian males ineligible for 16 of 100 seats in the entering class." (Pls.' MSJ 29.) As discussed in footnote three, Plaintiffs' assertion that the A-G Guidelines and Policies "render Christian school students ineligible for ninety-eight percent of the seats in the [UC] entering class" is mistaken. (Pls.' MSJ 29.)

course review process satisfies rational basis scrutiny.[33]

C. *Plaintiffs' "As Applied" Constitutional Claims*

Plaintiffs also challenge Defendants' application of the A-G Guidelines and Policies to specific courses for which Plaintiffs sought approval and were rejected under the Free Speech, Free Exercise, Establishment, and Equal Protection Clauses.

1. *Free Speech Clause*

Plaintiffs challenge Defendants' application of the A-G Guidelines under the Free Speech Clause, arguing that Defendants' rejections of Plaintiffs' courses were unconstitutional viewpoint discrimination and content regulation.[34]

As discussed in Part II.B.1, Defendants necessarily facilitate some viewpoints over others in judging the excellence of those students applying to UC. Therefore, unless a decision to deny course approval was unreasonable in light of UC's goal to

[33] Plaintiffs also claim that Defendants violate the Equal Protection Clause by requiring course approval for graduates of California high schools, but not for graduates of out-of-state high schools. (Pls.' Reply 10.) Because California high school students are not a suspect class, this practice is subject to rational review. As discussed in Part II.B.1.a.i.(f), Defendants' decision not to evaluate out-of-state high school courses is reasonable.

[34] The overbreadth and unbridled discretion doctrines only apply to facial challenges.

admit the most qualified students or was the product of animus, that decision is constitutional.

Plaintiffs' "as applied" claims concern rejected courses that fall into four subjects: (1) biology; (2) history and government; (3) English; and (4) religion. (*See* Watters Decl. Apps. A-C.) Plaintiffs do not provide an analysis as to why any of the more than 150 courses rejected **[38]**by UC should have been approved. Rather, Plaintiffs only claim that the courses were unconstitutionally rejected pursuant to UC's unconstitutional policies, such as the "Single Religious Viewpoint Policy."

However, the Court earlier found that these policies did not exist. Therefore, Plaintiffs have not supplied any basis for their summary judgment request on the ***1113** as-applied challenges to the rejection of specific courses. The Court is not obligated to consider matters not specifically brought to its attention. *See Carmen v. S.F. Unified Sch. Dist.*, 237 F.3d 1026, 1029 (9th Cir.2001) ("A district court is 'not required to comb the record [when ruling on] a motion for summary judgment.' "). Still, the Court will determine whether Defendants supply a rational basis for their rejection of Plaintiffs' courses.

Because only Plaintiffs seek summary judgment on their "as applied" claims, the Court reviews the evidence in the light most favorable to Defendants to determine if a genuine issue of material fact exists.

a. *Plaintiffs' Rejected Biology Courses*

Plaintiffs challenge Defendants' decision to reject biology courses that used *Biology: God's Living Creation* (published by A Beka) or *Biology for Christian Schools* (published by Bob Jones University ("BJU")) as the primary text. (Defs.' Opp'n 8.) Around early 2003, UC Professor Barbara Sawrey reviewed these two Christian biology textbooks [35] and concluded that they were inappropriate for use as primary texts in college-preparatory science classes. (Sawrey Decl. ¶ 3.) Professor Sawrey found these texts problematic because they characterized religious doctrine as scientific evidence, included scientific inaccuracies, failed to encourage critical thinking, and took an "overall un-scientific approach to the subject matter." (Defs.' Opp'n 9; Sawrey Decl. ¶ 3.) [36]

[39]Sawrey's "judgment was based not on the fact that the textbooks contained religious references and viewpoints, but on [her] conclusion that [the

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[35] Professor Sawrey also reviewed a Christian chemistry textbook published by BJU. (Sawrey Decl. ¶ 3.) She concluded this chemistry text could adequately serve as the primary text for UC-approved courses. (Sawrey Decl. ¶ 3.)

[36] The UC Position Statement on Science Courses reflects these concerns:

> The texts in question are primarily religious texts; science is secondary.... Courses that utilize these texts teach students that their conclusions must conform to the Bible, and that scientific material and methods are secondary. Students who [are] **[39]**taught to discount the scientific process and the scientific conclusions validated by a wealth of scientific research are not being provided with an understanding of scientific principles expected by the UC faculty.

(Wilbur Decl. No. 2 Ex. 2.)

texts] would not adequately teach students the scientific principles, methods, and knowledge necessary for them to successfully study those subjects at UC." (Sawrey Decl. ¶ .) [37] After forming her conclusions, Professor Sawrey shared her findings with other members of the course review committee, who supported her conclusions. (Sawrey Decl. ¶ 4.)

Defendants' biology experts, Professors Donald Kennedy [38] and Francisco Ayala,[39] *1114 concur in her judgment. Professor Kennedy determined that "[b]y teaching students to reject scientific evidence and methodology whenever they might be inconsistent with the Bible ... both texts fail to encourage critical thinking and the skills required for careful scientific analysis." (Kennedy Decl. Ex. A, at 8.) Professor Ayala found that the texts "reject the methodology generally accepted in science, which

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[37] Similarly, some Christian schools have declined to use BJU and A Beka textbooks because of concerns about the texts' academic merit. (Lynch Decl. No. 1 Exs. 47B ("[Valley Christian School] felt that the A Beka books ... did not represent the same level of academic rigor as we could find in some other texts."), 47C ("[Patten Academy declined to use A Beka and BJU textbooks] because they didn't provide the content that the principal and faculty believed would prepare the youngsters to meet their post-high school goals."); *cf.* Lynch Decl. No. 1 Ex. 47A ("[Oaks Christian School] acknowledge[s] that there was a much fuller treatment of evolution in the secular book that [it] used [than the BJU biology textbook, which it did not use].").)

[38] Professor Kennedy, the editor-in-chief of *Science* magazine, teaches biology at Stanford University, where he once served as President of the University. (Kennedy Decl. Ex. A, at 4-5.)

[39] Professor Ayala teaches biological sciences at University of California, Irvine. (Ayala Decl. Ex. A, at 4.)

relies on observation and experimentation and on the formulation of laws and theories that need to be tested rather than accepted on the basis of the Bible or any other authority." (Ayala Decl. Ex. A, at 4.)

Both professors concluded that neither of the two Christian textbooks are appropriate for use as the principal text in a college preparatory biology course. (Ayala Decl. Ex. A, at 28; **[40]**Kennedy Decl. Ex. A, at 20.) In making this finding, Professor Kennedy reiterated Professor Sawrey's initial conclusion that "the problem is not ... that the creationist view is taught as an alternative to scientific explanations, but that the nature of science, the theory of evolution, and critical thinking are not taught adequately." (Kennedy Decl. Ex. A, at 7.)

Plaintiffs' evidence also supports Defendants' conclusion that these biology texts are inappropriate for use as the primary or sole text. Plaintiffs' own biology expert, Professor Michael Behe,[40] testified that "it is personally abusive and pedagogically damaging to de facto require students to subscribe to an idea.... Requiring a student to, effectively, consent to an idea violates [her] personal integrity. Such a wrenching violation [may cause] a terrible educational outcome." (Behe Decl. ¶ 59.)

Yet, the two Christian biology texts at issue commit this "wrenching violation." For example, Biology for Christian Schools declares on the very first page that:

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[40] Professor Behe teaches biological sciences at Lehigh University. (Behe Decl. 47.)

(1) " 'Whatever the Bible says is so; whatever man says may or may not be so,' is the only [position] a Christian can take...."

(2) "If [scientific] conclusions contradict the Word of God, the conclusions are wrong, no matter how many scientific facts may appear to back them."

(3) "Christians must disregard [scientific hypotheses or theories] that contradict the Bible."

(Phillips Decl. Ex. B, at xi.)

Defendants have raised a genuine issue of material fact as to whether their rejection of Plaintiffs' biology courses was reasonable.

b. *Plaintiffs' Rejected History and Government Courses*

Plaintiffs challenge Defendants' decision to deny history and government courses that used primary texts published by BJU or A Beka. Professor James Given, while on the UC course review committee, reviewed the United States history textbook published by BJU and concluded that the text failed to adequately teach critical thinking and modern historical analytic methods. Professor Given reached this conclusion because the text:

[41]instructs that the Bible is the unerring source for analysis of historical events, attributes historical events to divine providence rather than analyzing human action, evaluates historical figures and their

contributions based on their religious motivations or lack thereof and contains inadequate treatment of several major ethnic groups, women, and non-Christian religious groups.

(Given Decl. ¶ 8.)

Defendants' history expert, Professor Gary Nash,[41] concurred with Professor *1115 Givens' evaluation, finding that the text should not be used as the primary text for a college-preparatory history course. (Nash Decl. Ex. A, at 6.) Specifically, Nash found that the text failed to encourage "historical thinking skills and analytical thinking" and failed to cover "major topics, themes, and components of United States history." (Nash Decl. Ex. A, at 6.) "From reading the [reviewed text], students will have little opportunity to exercise independent judgment, to sharpen their critical thinking skills, or to consider multiple perspectives of those who made our history." (Nash Decl. Ex. A, at 9.) These students "will have difficulty understanding history as a discipline as it has been practiced since Herodotus and Thucydides-a never-ending quest to reconstruct the past based on new evidence and informed by new questions posed about the functioning of past societies." (Nash Decl. Ex. A, at 9.)

Defendants' government expert, Professor Mark Petracca, evaluated a government text published by BJU that each of the rejected government courses

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[41] Professor Nash has taught history at the University of California, Los Angeles for "nearly forty years." (Nash Decl. Ex. A, at 3.)

relied on as the primary or sole text, finding that "[u]se of this [text] as the principal text in a United States government course will not provide adequate preparation for study at UC." (Petracca Decl. Ex. A, at 2.) Professor Petracca found that the BJU government text does not acknowledge the commonly-accepted framework for scholarly analysis and provides little opportunity for critical thinking. (Petracca Decl. Ex. A, at 2.) In addition, the text contains "many factual and empirical assertions that are not generally accepted among political scientists [or] historians and that are nevertheless not substantiated within the text by evidence." (Petracca Decl. Ex. A, at 3.)

[42]Defendants have raised a genuine issue of material fact as to whether their rejection of Plaintiffs' history and government courses was reasonable.

c. *Plaintiffs' Rejected English Course*

Plaintiffs challenge Defendants' decision to deny one English course that used a primary text published by A Beka. First, the A Beka text (*Classics for Christians*) is an "anthology of excerpts," which UC will not approve, no matter the content of the excerpts. "College-preparatory courses are expected to require students to read full-length works." (Defs.' Opp'n 12; Lynch Decl. No. 1 Ex. 2, at 5.) Plaintiffs' English expert, Dr. Sandra Stotsky,[42] agreed that a

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[42] Dr. Stotsky is an independent researcher and consultant in education. She received her doctorate in reading research and reading education from the Harvard Graduate School of

general rule against anthologies of excerpts is reasonable. (Lynch Decl. No. 2 Ex. 104.) Second, Jeanne Hargrove, a UC course reviewer, found the A Beka text inappropriate as a primary text in English because its "selection of works and pedagogical apparatus were inconsistent with ... expectations regarding critical thinking and broad exposure to writers' key works." (Hargrove Decl. ¶ 5.)

Defendants' English expert, Professor Samuel Otter,[43] concurs, finding that the A Beka text is inadequate for a college-preparatory English class because it "fails to provide substantial readings and because it insists on specific interpretations [of those readings]." (Otter Decl. Ex. A, at 4.) These deficiencies rendered the text inadequate to provide "analytical and critical skills." (Otter Decl. Ex. A, at 4.) Further, Otter explains that the text fails to meet ***1116** UC standards "not because it offers a 'Christian and civic' perspective on its materials but because it fails to provide substantial readings and because it insists on specific interpretations." (Otter Decl. Ex. A, at 4.) "Such a combination contradicts the emphasis on analytical and critical thinking required [by the A-G Guidelines]." (Otter Decl. Ex. A, at 7.)

[43]Defendants have raised a genuine issue of material fact as to whether their rejection of Plaintiffs' English course was reasonable.

Education and serves on the National Mathematics Advisory Panel. (Stotsky Decl. Ex. 1.)

[43] Professor Otter has taught American literature for sixteen years at the University of California, Berkeley. (Otter Decl. Ex. A, at 3.)

d. *Plaintiffs' Rejected Religion Courses*

The majority of courses that Plaintiffs claim were unconstitutionally rejected were rejected under the UC Policy on Religion and Ethics Courses. (Defs.' Opp'n 12.) This policy requires that approval will be given to religion courses if they "treat the study of religion or ethics from the standpoint of scholarly inquiry rather than in a manner limited to one denomination or viewpoint" and should not have as a primary goal promoting the "personal religious growth" of students. (Lynch Decl. No. 1 Ex. 3.) As discussed in Part II.B.1.a.i.(a).(1), Defendants have offered expert testimony from Professor Sharf, which led this Court to determine that the policy was reasonable. Because Plaintiffs only argue that their courses were unreasonably rejected because the UC Policy on Religion and Ethics courses is unconstitutional, the reasonableness of the Defendants' rejections dovetails with the reasonableness of the UC Policy on Religion and Ethics Courses.

Accordingly, there is a genuine issue of material fact as to whether Defendants' rejection of Plaintiffs' religion courses was reasonable.

2. *Free Exercise and Establishment Clauses*

Plaintiffs contend that Defendants exhibit unconstitutional "hostility" toward religion. Plaintiffs' allegations of hostility cover a broad range of hostile acts. (*See, e.g.*, Pls.' MSJ 24 ("UC's policies ... single out (and thus discriminate against)

religious schools that add religious viewpoints...."), 25 ("[A UC reviewer] laughed at a creationist statement.").) Defendants' allegedly hostile acts can be divided into two general categories: (1) UC employees made statements, held beliefs, or took actions that are symbolically hostile to religion or religious schools; and (2) UC employees-in implementing the A-G Guidelines and Policies-took hostile actions that burdened Plaintiffs' religious practice. These categories are analyzed under the Establishment Clause and Free Exercise Clause, respectively.

[44]a. *Symbolic Hostility Under the Establishment Clause*

The *Lemon* test governs "a claim brought under a hostility to religion theory." *Am. Family*, 277 F.3d at 1121; *see also Vernon*, 27 F.3d at 1396 (9th Cir.1994) ("The government neutrality required under the Establishment Clause is ... violated as much by government disapproval of religion as it is by government approval of religion."). Under *Lemon*, government action does not violate the Establishment Clause if it: (1) has a secular purpose, (2) has a primarily secular effect, and (3) does not excessively entangle the government with religion. 403 U.S. at 612-13.

Plaintiffs allege the following actions and beliefs symbolically disapprove of their religion:

(1) "[UC] reviewers spoke sarcastically of 'our favorite, Bob Jones University Press,' and of 'our

favorite books,' and laughed at a creationist statement."

(2) "[UC reviewers] circulated an article about how 'the Red States, on the other hand, now have to cope with ... 100% of all Televangelists, ... *1117 Bob Jones University, ... and [things generally viewed as disfavorable, such as mosquitoes]. A small price to pay for controlling the presidency."

(3) "[AUC] reviewer told the review coordinator that a 'Christian Lifestyles' course was 'weird stuff.' "

(4) "The faculty reviewer of the Christian school science texts believes that theistic evolution is illogical, the later faculty reviewer has 'antipathy' toward creation...."

(5) "The senior reviewer is Buddhist, and the reviewer who handled religious school science courses and drafted most policies is Jewish...."

(6) "The new chair of [the UC review board] testified the 'subtext' of BOARS discussion in adopting the science Position Statement was 'antagonism toward the Christian schools,' and their 'right wing perspectives were highly objectionable.' "

(7) "[UC] reviewers segregated the Christian school courses into a separate list."

(8) "UC ordered copies of a number of BJU Press texts, and created a 'Bibliography of Christian Books Reviewed,' even though UC does not normally review textbooks (just course outlines), to reject them."

[45](9) "[UC] created form 'letters that [UC] sent to Christian schools when [UC] denied some of their courses.' "

(Pls.' MSJ 25-26.)

As a threshold matter, some of Plaintiffs' allegations can be discarded immediately as unworthy of summary judgment. First, allegations (1) and (2) are not "government conduct." There is no indication that it is the official position of UC to laugh at creationist statements or poke fun at "the Red States." These "hostile actions" contrast greatly with those in *American Family*, where the government formally adopted resolutions that criticized religious speech. 277 F.3d at 1119. At best, Plaintiffs have discovered inappropriate and hostile remarks made by UC employees at the expense of religion. However distasteful those statements may have been, they are not fairly characterized as government action even if told in the work environment. [44] *See Single Moms, Inc. v. Mont. Power Co.*, 331 F.3d 743, 747 (9th Cir.2003) ("[I]ndividual action may be treated as the government's action if ... that seemingly private behavior may be fairly treated as that of the State itself."); *see also Am. Family*, 277 F.3d at 1125 ("[P]ublic officials may criticize practices that they would have no constitutional ability to regulate, so

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[44] Even if the comments made by UC reviewers were unconstitutional hostility towards religion, the judicial remedy would not be to invalidate the A-G Guidelines and Policies as Plaintiffs request.

long as there is no actual or threatened imposition of government power or sanction.").

Also, allegations (3) and (4) cannot support a claim of hostility. Even if these allegations were true, UC employees may believe whatever they choose to believe. Plaintiffs have not demonstrated that these beliefs affect the way that Defendants review courses, an issue that would require evaluation under the Free Exercise Clause. (*See, e.g.*, Pls.' MSJ 25 ("[T]he coordinator of reviewers believes any course with one religious viewpoint added must be rejected.").)

Additionally, allegation (5) cannot support a hostility claim. UC is under no duty to employ only those individuals whose religious beliefs coincide with Plaintiffs.

[46]*1118 Finally, this Court has previously found that allegation (9) added little to an analysis of motive. (*See* Part II.B.1.a.ii.)

Remaining are allegations (7), (8), and (9), which all relate to Defendants' implementation of the A-G Guidelines and Policies that Plaintiffs claim could be seen as disapproving of religion.[45] Plaintiffs contend

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[45] Allegation (8), as phrased by Plaintiffs, is not supported by any evidence. Although UC ordered Christian textbooks to review, there is no evidence that UC ordered Christian textbooks "to reject them." (Pls.' MSJ 25.) In fact, some Christian textbooks were approved for use as a primary text. (Sawrey Decl. ¶ 3.) In evaluating allegations (7), (8), and (9) under the Establishment Clause, the Court will only consider that UC ordered Christian textbooks for review.

that by keeping a separate list of Christian courses, taking the "unusual" step of reviewing Christian textbooks, and creating form language to reject Christian courses, Defendants could be seen as requiring religious courses to pass greater scrutiny than secular courses.[46]

i. *Secular Purpose*

Defendants provide a simple secular reason for the challenged actions: they were "respon[ding] to certain Christian school representatives' challenges to UC decisions (including threats of and the actual filing of this lawsuit)...." (Hargrove Decl. ¶ 26.) Under the threat of litigation and the subsequent exacting scrutiny that comes with litigation, Defendants took greater care to document their decisions. "Because some Christian schools had complained about rejections of certain of their courses, [UC] decided that questionable courses from those schools would be reviewed by the committee and then in many cases by faculty before they were either approved or disapproved." (Hargrove Decl. ¶ 21.)

ii. *Secular Effect*

Here, an informed and reasonable observer would not find Defendants' action to have "the

[46] Plaintiffs make no attempt to analyze these allegedly hostile actions under *Lemon*, arguing only that the actions are hostile and that hostility is forbidden. (Pls.' MSJ 24-25 ("The Supreme Court has frequently stated that 'hostility toward religion' is forbidden.... [These actions are] unconstitutional hostility toward religion, as a matter of law.").)

principal or primary effect of ... inhibiting religion." *See Am. Family*, 277 F.3d at 1122. Paying [47]more attention to Christian school courses because the Christian schools are vocal about rejections and threatening legal action appears perfectly reasonable.

iii. *Excessive Entanglement*

As discussed in Part II.B.2.a.i.(c), Defendants' actions pose no danger of invasive monitoring. Rather, these actions only serve to help Defendants make a more informed and considered judgment as to whether Plaintiffs' courses meet UC's academic standards.

b. *Burdensome Hostility Under the Free Exercise Clause*

Plaintiffs allege that several of Defendants' actions and beliefs inhibit Plaintiffs' ability to practice their religion:

(1) "UC's policies ... single out ... religious schools that add their religious viewpoint."

(2) "[UC reviewers], in rejecting Christian school science texts and courses, did not question that the courses cover the required science, but objected to the added religious viewpoint."

(3) "[T]he coordinator of reviewers believes any course with one religious viewpoint added must be rejected."

(4) "[T]he faculty reviewer of the history texts believes that courses may *1119 not attribute any event in history to 'a Christian god.' "

(5) "[UC] reviewers all wrote that religion courses taught by Cantwell / Sacred Heart of Mary should be rejected because they taught a single perspective."

(Pls.' MSJ 24-26.)

Again, some of Plaintiffs' allegations can be discarded immediately as unworthy of summary judgment. As described in Part II.A allegations (1) and (2) are simply incorrect.

Allegations (3) and (4) also present a problem. These allegations are each phrased as a "belief" of a single reviewer.[47] Plaintiffs provide no evidence that these beliefs resulted in the rejection of any courses "with one religious viewpoint" or any history courses that "attribute [even a single] event in history to 'a Christian god.' " Further, the evidence presents an issue of material [48]fact as to whether allegations (3) and (4) are true. Plaintiffs' evidence is less than compelling,[48] and UC provides declarations from the

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[47] As discussed in Part II.A, these alleged "beliefs" are not UC policy.

[48] First, Plaintiffs claim that reviewer Jeanne Hargrove believes courses "with one religious viewpoint" should be rejected based solely on two pages of handwritten notes regarding a rejected course. (Pls.' Ex. 302.) Plaintiffs ignore that these notes indicate numerous other problems with the courses.

Second, Plaintiffs claim that Professor James Given believes history courses should be rejected if they "attribute [even a single] event in history to 'a Christian god' " based

reviewers refuting Plaintiffs' allegations. (*See* Hargrove Decl. ¶ 11 ("I do not hold any such belief."); Given Decl. ¶ 5 ("I have not recommended against approval of courses merely because they ... present religious ... explanations of history. Nor does any reference to providential explanations of history automatically disqualify a course for approval in my view.").)

Finally, there is a genuine issue of material fact as to the truth of allegation (2), that "[UC] reviewers all wrote that religion courses taught by Cantwell / Sacred Heart of Mary should be rejected because they taught a single perspective." Plaintiffs cite to documents showing various notes regarding concern about the Cantwell courses, but ignore that these notes express numerous additional concerns. (Pls.' Ex. 282.) These concerns included a lack of prerequisites, a lack of details in key assignments, a need for "broader study of sociological topics," a focus on "religious training," a lack of depth, the use of a questionable text, and "not academically rigorous." (Pls.' Ex. 282.)

Because there is a material issue of genuine fact regarding the existence of Plaintiffs' allegations of hostility, summary judgment is inappropriate on this issue.

3. *Equal Protection Clause*

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solely his comment that "[h]istory is not made by supernatural agents" when rejecting a history course from The Kings Academy. (*See* Pls.' Ex. 130.)

Plaintiffs also challenge Defendants' application of the A-G Guidelines under the Equal Protection Clause. Again, Plaintiffs argue that Defendants' actions treat religious schools and their students differently. As before, if these actions are not unconstitutional under the Free Exercise Clause, Defendants need only supply a rational basis for the actions. As discussed in Part II.C.2, Defendants have raised a genuine issue of material fact as to the rational basis for their actions.

[49]III. *RULING*

For the foregoing reasons, Plaintiffs' Motion for Summary Judgment is DENIED and Defendants' Motion for Partial ***1120** Summary Judgment is GRANTED as to Plaintiffs' facial claims.

Remaining as issues for trial are the reasonableness of Defendants' challenged decisions to deny approval for specific religious school courses under the A-G Guidelines and Policies and Plaintiffs' other "as applied" challenges.

IT IS SO ORDERED.

APPENDIX D

UNITED STATES DISTRICT COURT,
CENTRAL DISTRICT OF CALIFORNIA.

No. CV 05-6242 SJO (RZx)

ASSOCIATION OF CHRISTIAN SCHOOLS INTERNATIONAL, ET AL., V. ROMAN STEARNS, ET AL.,

Aug. 8, 2006

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION TO DISMISS PUSUANT TO FED. R. CIV. P. 12(b)(1) & 12(b)(6)

S. JAMES OTERO, District Judge.

On October 28, 2005, Defendants Regents of the University of California ("UC Regents") and various officials and offices of the University of California ("UC") filed a Motion to Dismiss Pursuant to Federal Rule of Civil Procedure 12(b)(1) and 12(b)(6). On November 21, 2005, Plaintiffs Association of Christian Schools International, Calvary Chapel Christian School ("Calvary Christian School"), and five Calvary Christian School students by and through their parents filed an Opposition to the Motion, to which Defendants replied. On June 27, 2006, this Court heard argument on Defendants' Motion. For the reasons discussed below, the Court GRANTS the Motion in part and DENIES it in part.

[2]I. BACKGROUND

Plaintiffs Association of Christian Schools International, Calvary Christian School, and five Calvary Christian School students by and through their parents have brought suit against Defendants UC Regents and various officials and offices of the UC for violating their constitutional rights. Plaintiffs allege that through the implementation and practice of discriminatory admissions practices, Defendants have discriminated against Plaintiffs, infringing on Plaintiffs' freedom of speech, freedom from viewpoint discrimination, freedom of religion and association, freedom from arbitrary governmental discretion, equal protection of the laws, and freedom from hostility toward religion. *Id.*

According to Plaintiffs' Complaint, there are several methods by which a high school student may be eligible to gain admission to the University of California institutions. (Compl. ¶26.) The most prevalent method for students attending private schools in California is known as "Eligibility in the Statewide Context," by which 92.5% of students achieving eligibility in 2003 did so. *Id.* Under this method, students may be eligible to gain admission to the University of California institutions with a high enough combination of standardized test scores and grades in a required number of courses, known as "a-g" course requirements.[1] *Id.* These a-g course

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[1] General requirements by subject area:
The following sequence of high school courses is required by the University of California of (sic) high school students to be minimally eligible for admission. It also illustrates the minimum level of academic preparation students

[3]requirements are met when students at their respective schools take courses that have been approved by Defendants for a particular subject area. *Id.* ¶ 23.

There are two less favored (i.e., more difficult) methods for achieving eligibility for admission to the

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ought to achieve in high school to undertake university level work.

The a-g requirements can be summarized as follows:

(a) History/Social Science – Two years required, including one year of world history, cultures, and geography and one year of U.S. history or one-half year of U.S. history and one-half year of civics or American government.

(b) English – Four years of college preparatory English that include frequent and regular writing, and reading of classic and modern literature.

(c) Mathematics – Three years of college preparatory mathematics that include the topics covered in elementary and advanced algebra and two-and three-dimensional geometry.

(d) Laboratory Science – Two years of laboratory science providing fundamental knowledge in at least two of these three disciplines: biology, chemistry, and physics.

(e) Language Other Than English – Two years of the same language other than English.

(f) Visual & Performing Arts – One year, including dance, drama/theater, music, [3]or visual art.

(g) College Preparatory Elective – In addition to those courses required in "a-f" above, one year (two semesters) of college preparatory electives are required, chosen from advanced visual and performing arts, history, social science, English, advanced mathematics, laboratory science, and language other than English. (Compl. ¶ 23 (emphasis in original).)

University of California.[2] One such method is known as "Eligibility in the Local Context." Under this method, students ranking in the top 4% at each participating California high school is eligible for admission.[3] *Id.* ¶ 26. Students may also attain eligibility for admission through a method known as "Eligibility by Examination Alone." Only students with exceptionally high scores on standardized tests may qualify for admission by this method. *Id.*

Calvary Christian School avers that it sought to comply with the requirements of offering approved courses satisfying a-g course requirements. Specifically, Calvary Christian School avers that it submitted applications for approval of courses to qualify under the science (d), college preparatory elective (g), history/social science (a), and English (b) categories as described above. *Id.* ¶¶ 31-50. In each instance, Defendants allegedly rejected Calvary Christian School's application for approval. *Id.*

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[2] Another method, not counted as being one to achieve eligibility for admission but outright admission, is known as "Admission by Exception." A student may gain admission to a particular University of California school at the discretion of the campus admissions director. Students admitted through this method are generally those exhibiting exceptional qualifications (e.g., athletes, artists, veterans, etc.) (Compl. ¶ 29.)

[3] A participating high school is a school that offers sufficient approved a-g required courses that would enable its students to achieve Eligibility in the Statewide Context. Hence, at a school that does not offer sufficient approved a-g requirements courses for students to achieve Eligibility in the Statewide Context, these students, accordingly, also would not be able to achieve Eligibility in the Local Context. (Compl. ¶ 26A.)

[4]In rejecting Calvary Christian School's applications, Plaintiffs aver that Defendants made several statements. In response to a biology course application, Defendants Stearns allegedly wrote:

> The content of the course outlines submitted for approval is not consistent with the viewpoints and knowledge generally accepted in the scientific community. As such, students who take theses courses may not be well prepared for success if/when they enter science courses/programs at UC.

Id. ¶ 31. Also. Defendants allegedly have stated generally that biology and physics courses relying on science textbooks containing a Christian viewpoint from two particular publishers would not be approved to meet the lab science requirement. *Id.* Furthermore, rejection of courses relying on the particular textbooks was said by Defendants to be based on "the way in which these texts address the topics of evolution and creationism' and "their general approach to science' in relation to the Bible." *Id.* ¶ 32. It is based on these and other alleged statements made by Defendants that Plaintiffs bring this action for discrimination.

II. LEGAL STANDARD

A. Motion to Dismiss

Rule 12(b)(6) must be read in conjunction with Rule 8(a) which requires "a short and plain statement of the claim showing that the pleader is entitled to relief." 5A Charles A. Wright & Arthur

Miller, Federal Practice and Procedure §1356 (1990). A Rule 12(b)(6) dismissal is proper only where there is either a "lack of a cognizable legal theory" or "the absence of sufficient facts alleged under a cognizable legal theory." *Balistreri v. Pacifica Police Dept.*, 901 F.2d 696, 699 (9th Cir. 1988). A complaint should not be dismissed under Rule 12(b)(6) "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Id.* The court must accept all material allegations in the complaint as true and construe them in the light most favorable to the plaintiff. *See NL Indus., Inc. v. Kaplan*, 792 F.2d 896, 898 (9th Cir. 1986); *see also, Russell v. Landrieu*, 621 F.2d 1037, 1039 (9th Cir. 1980).

Unless a court converts a Rule 12(b)(6) motion into a motion for summary judgment, a court cannot consider material outside of the complaint (e.g., facts presented in briefs, affidavits, or discovery materials). *Levine v. Diamanthuset, Inc.* 950 F.2d 1478, 1483 (9th Cir. 1991). A [5]court may, however, consider exhibits submitted with the complaint and matters that may be judicially noticed pursuant to Federal Rule of Evidence 201. *Hal Studios, Inc., v. Richard Feiner & Co.*, 896 F.2d 1542, 1555 n.19 (9th Cir. 1989).

For all these reasons, "[d]ismissal is warranted only if it appears to a certainty that [plaintiff] would be entitled to no relief under any state of facts that could be proved." *NL Indus.*, 792 F.2d at 898. However, a court need not accept as true unreasonable inferences or conclusory legal allegations. *See W. Min. Council v. Watt*, 643 F.2d

618, 624 (9th Cir.), *cert. denied*, 454 U.S. 1031 (1981).

B. Subject Matter Jurisdiction

It is a fundamental legal principle that federal courts are courts of limited jurisdiction. "A federal court is presumed to lack jurisdiction in a particular case unless the contrary affirmatively appears." *Stock West, Inc. v. Confederated Tribes*, 873 F.2d 1221, 1225 (9th Cir. 1989) (citation omitted). Lack of subject matter jurisdiction may be raised by any party at any time, and it is never waived. "[W]henever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action." Fed. R. Civ. P. 12(h)(3); *Hernandez v. McClanahan*, 996 F. Supp. 975, 977 (N.D. Cal. 1998).

III. DISCUSSION

A. Federal Constitutional Claims

1. First Amendment Speech Claim

In their Motion, Defendants contend that Plaintiffs fail to state a First Amendment speech claim "because Defendants are not stopping Plaintiffs from saying whatever they choose and because the University has its own First Amendment right to establish rigorous admission standards." (Defs.' Motion 5.) Furthermore, Defendants argue in their Reply that the cases cited by Plaintiffs are inapposite. (Defs.' Reply 3.) In contrast, Plaintiffs contend that it is not necessary for Defendants to

issue a total prohibition on speech for a freedom of speech violation to occur. (Pls.' Opp'n 6.) Instead, Plaintiffs argue that Defendants' actions, rejecting Plaintiffs' applications for a-g course approval because of Plaintiffs' incorporation of Christian material to the proposed courses, amount to First Amendment violations in the form of content regulation, viewpoint [6]discrimination, prescription of orthodoxy, and chilling of rights. *Id.* Whether or not Plaintiffs have stated a First Amendment freedom of speech claim by so contending is the issue at hand.

a. Restriction of Plaintiffs' Speech

According to the Supreme Court, "the Constitution's protection is not limited to direct interference with fundamental rights." *Healy v. James*, 408 U.S. 169, 183 (1972). Hence, contrary to Defendants' assertion that Plaintiffs have failed to state a speech violation claim simply because "Defendants are not stopping Plaintiffs from saying whatever they choose" (Pls.' Mot. 5), outright prohibition of particular activities is not required for a First Amendment speech violation. Instead, the Supreme Court has found in a number of cases (*i.e.*, many of those cases cited by Plaintiffs) that the freedom of speech is violated where government actions had the same effect if impeding the freedom of speech even without explicitly curtailing what was said.[4]

[4] The Defendants' efforts to convince this Court that prior Supreme Court First Amendment decisions are inapposite to the matter at hand are unavailing. In *Healy*, where a school administration denied official recognition to a student group,

Fundamentally, the government is forbidden from engaging in regulation of speech based on its substantive content or its message. *Police Dep't v. Mosley*, 408 U.S. 92, 96 (1972). The bar against content—based regulation is high: "[d]iscrimination against speech because of its message is presumed to be unconstitutional." *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995).

[7]The practice of viewpoint discrimination is related to that of content-based regulation. "Viewpoint discrimination is...an egregious form of content discrimination." *Id.* Viewpoint discrimination occurs when the government takes issue with particular views held by a speaker on a subject, rather than with the subject matter itself. *R.A.V. v. St. Paul*, 505 U.S. 377, 391 (1992).

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the Supreme Court purposely chose to disagree with the lower courts' characterization of the consequences of nonrecognition. Justice Powell stated, "[I]n this case, the group's possible ability to exist outside the campus community does not ameliorate significantly the disabilities imposed by the President's actions. We are not free to disregard the practical realities." He then went on to quote Justice Stewart: "'Freedom such as these are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference.'" *Healy*, 408 U.S. at 183 (citations omitted). Accordingly, this Court is not free to disregard the practical realities of Defendants' actions with respect to Plaintiffs' First Amendment rights. As in *Healy* and in the other cases cited by Plaintiffs, Plaintiffs aver that the practical reality of Defendants' actions is that it has become more difficult for Plaintiffs to exercise their First Amendment rights. If Plaintiffs' averment proves to be true, whether or not such effect is justified within the bounds of the law is the primary inquiry of this action.

Government regulation of a speaker's viewpoint simply is not allowed. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983).

Here, Plaintiffs have alleged in their Complaint that it is the inclusion of religious material, and more specifically, that of a Christian viewpoint, to standard subject matter presentation in the course applications that prompted Defendants' rejection of Plaintiffs' applications for a-g course approval. The Complaint clearly states that "Defendants have rejected textbooks and courses based on a viewpoint of religious faith." (Compl. ¶ 30.) Further, the Complaint states that Defendants explicitly acknowledged that rejection of proposed science courses was based on the use of textbooks containing a Christian viewpoint. In fact, Plaintiffs have alleged that Defendants have a policy of rejecting applications from Christian schools that use particular textbooks containing a Christian viewpoint. Such applications generate a standardized response: "The content of the course outlines submitted for approval is not consistent with the viewpoints and knowledge generally accepted in the scientific community." *Id.* ¶ 31. The Complaint makes clear that no other reasons have been given for rejecting the applications. *Id.* ¶ 33. In addition, the Complaint contains information on Defendants' *"University of California Position Statement: 'A G' Course Approval for High School Science Courses Taught from Textbooks from Selected Christian Publisher."* *Id.* ¶ 32. The Position Statement, directed at Christian schools and discussing the requirements for approved science courses, instructs Christian schools to "develop and

submit for UC approval a *secular* science curriculum with a text and course outline that addresses course content/knowledge *generally accepted* in the scientific community." *Id.* (emphasis in original).

Evidently, Plaintiffs' references to Defendants' alleged acts of content-based regulation and viewpoint discrimination in their Complaint are numerous and specific. The Complaint contains detailed accounts of the responses Plaintiffs received from Defendants after submitting [8]applications for approval in various subject areas (*e.g.*, history ¶¶ 39-44; English and literature ¶¶ 45-47; social science ¶¶ 48-50). The Complaint also contains specific allegations as to the roles of the individual Defendants in commission of the alleged First Amendment violations, ¶¶ 54-55. Suffice it to say, the Complaint clearly indicates that Plaintiffs have alleged sufficient facts to allow this claim to go forward.

b. Defendants' First Amendment Rights

Defendants assert that Plaintiffs' claim of free speech violation under its content-based/viewpoint discrimination theories fails because "the University's right to set its own admissions standards is protected by the First Amendment." (Defs.' Mot. 7.) Defendants argue that the evaluation and approval or disapproval of the content and viewpoints of academic expression is required to enforce academic standards. *Id.* at 8.

Certainly, members of the Supreme Court have articulated on various occasions that a university's

decisions regarding its admissions policies deserve a measure of sanctity. Justice Powell, in another matter involving the University of California Regents, stated, "The freedom of a university to make its own judgments as to education includes the selection of its student body." *Univ. of Cal. Regents v. Bakke*, 438 U.S. 265, 312 (1978) (Powell, J., Concurring). Justice Frankfurter described admissions policies as being among the "four essential freedoms" of a university, along with the freedoms of "who may teach, what may be taught, [and] how it shall be taught." *Sweezy v. N.H.*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring).

However, as Plaintiffs point out, the freedom that a university enjoys to determine its own admissions policies is not without limit. Justice Powell in *Bakke* recognized, "Although a university must have wide discretion in making the sensitive judgments as to who should be admitted, constitutional limitations protecting individual rights may not be disregarded." 438 U.S. at 314. Essentially, *Bakke* supports the proposition that a university's freedom to determine who is to be admitted does not extend so far as to allow invidious discrimination in admissions policies. Along with race discrimination, the issue in *Bakke*, bias against a person because of her religion has been characterized by the Supreme Court as an invidious discrimination. *Cameron v. Johnson*, **[9]**381 U.S. 741, 751 (1965). By extension, it is difficult to imagine how discrimination because of a particular manifested religious viewpoint could itself be anything less than invidious.

In the matter at hand, at issue is Defendants' rejection of Plaintiffs' applications for a-g course approval. If in fact such rejection is based on Defendants' discrimination of Plaintiffs' applications solely because of the religious viewpoints expressed in the applications, such action would run afoul of the limits of Defendants' freedom to determine its admissions policies. Hence, Defendants' assertion of their First Amendment right to set their own admissions standards does not shield Defendants from the prohibition of engaging in content-based regulation or viewpoint discrimination.

In addition, Defendants contend that the regulation of content and viewpoints of academic speech is permissible as long as it is "reasonably related to legitimate pedagogical concerns." (Defs.' Mot. 10.) This standard, articulated in *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988), concerned a public high school principal's decision to censor certain articles written by students in a journalism class for a newspaper created by that class. Defendants cite a number of appellate level decisions to support their position that their rejection of Plaintiffs' applications for a-g course approval, even if based on the content and viewpoints contained within the course applications, does not violate the First Amendment. These cases, however, along with *Hazelwood*, are inapposite to the issue at hand. In *Hazelwood*, *Brown v. Li*, 308 F.3d 939 (9th Cir. 2002), *Settle v. Dickson County Sch. Bd.*, 53 F.3d 152 (6th Cir. 1995), and *Axson-Flynn v. Johnson*, 356 F.3d 1277 (10th Cir. 2004), the speech at issue was that of students attending the schools that were regulating the speech. Here, the

speech at issue is that of independent entities (*i.e.*, Christian schools) and is not necessarily student speech. Granted, students are included among the Plaintiffs, but the applications put forth for a-g course approval were ostensibly prepared and submitted by the school and thus arguably may be considered to primarily be the school's speech. Hence, the issue has less to do with a school censoring its own students' speech, and more to do with a school (*i.e.*, Defendants) censoring a separate entity's (*i.e.*, Plaintiffs) speech. This crucial distinction in the relationship of the parties makes it difficult to rationalize why the standard in *Hazelwood* should apply here.

[10]Neither is *Fleming v. Jefferson County Sch. Dist. R-1*, 298 F.3d 918 (10th Cir. 2002), another case cited by Defendants, particularly instructive. The court in *Fleming* was concerned with speech "that might reasonably be perceived to bear the imprimatur of the school and that involved pedagogical concerns." 298 F.3d at 924. The facts in *Fleming* may be better analogized to those in the matter at hand, as the speech there was that of community members and not limited to students, as in the instant matter. However, here, unlike for the speech at issue in *Fleming*, it simply would not be reasonable for all courses that receive a-g course approval to be perceived as bearing Defendants' imprimatur. A-g approved courses are clearly taught by many different high schools across the state of California, entities separate and independent from Defendants. In addition, the number and range of course topics make it unlikely for the courses to be perceived as being anything but courses taught by

the respective high schools. Hence, even if Defendants' actions in rejecting Plaintiffs' course applications are reasonably related to legitimate pedagogical concerns, this outcome does not necessarily shield Defendants from First Amendment liability, in the event of content-based or viewpoint discrimination of Plaintiffs' speech.

A complaint should not be dismissed under Rule 12(b)(6) "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Balistreri*, 901 F.2d at 699. Based on the information contained in the Complaint, it is evident that Plaintiffs have alleged sufficient facts to state a claim for violation of the freedom of speech in the forms of content-based regulation and viewpoint discrimination. Defendants' arguments of their own First Amendment rights permitting potential infringement upon the rights of Plaintiffs are unavailing. As such, it is not necessary for the Court to explore at this time the Plaintiffs' other freedom of speech violation charges of prescription of orthodoxy and chilling of speech. Defendants' Motion to Dismiss Plaintiffs' freedom of speech claim is DENIED.

2. Free Exercise of Religion Claim

Defendants also take issue with Plaintiffs' claim that Defendants' actions violate Plaintiffs' free exercise of religion. In *Thomas v. Review Bd. of Ind. Employment Sec. Div.*, 450 .S. 707 (1981), the Supreme Court established:

> [11]Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists. While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial.

Thomas, 450 U.S. at 717-18. The court also observed that "[t]he determination of what is a 'religious' belief or practice is more often than not a difficult and delicate task...However, the resolution of that question is not to turn upon a judicial perception of the particular belief or practice in question...." *Id.* at 714. As the court put it, "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." *Id.*

The Supreme Court's decision in *Thomas* is instructive. In that case, the court held that a state's denial of unemployment benefits unlawfully burdened an employee's right to free exercise of religion. Thomas, the petitioner, held religious beliefs that forbade him from participating in the production of armaments. He was forced to leave his job when his employer transferred him to a division that fabricated turrets for tanks. Indiana subsequently denied him unemployment compensation benefits. The Supreme Court recognized that the coercive impact was indistinguishable from that in *Sherbert v. Verner*,

374 U.S. 398 (1963), in which the court held that a ruling disqualifying petitioner from benefits because of her refusal to work on Saturday in violation of her faith "force[d] [the petitioner] to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand." *Sherbert*, 374 U.S. at 404. Citing *Sherbert* the *Thomas* court stated "[n]ot only is it apparent that appellants' declared ineligibility for benefits derives solely from the practice of [his] religion, but the pressure upon [him] to forego, (sic) that practice is unmistakable." *Thomas*, 450 U.S. at 717. The court therefore determined that Thomas had been "put to a choice between fidelity to religious belief or cessation of work." *Id* at 717. Accordingly, the court held that Indiana's denial of unemployment compensation benefits violated Thomas' right to the free exercise of his religion.

[12]At the June 27, 2006 hearing on this Motion, Plaintiffs' counsel stated that Plaintiffs have not pled a substantial burden on a central religious belief or core practice. Defendants' counsel, however, conceded that centrality may not be crucial to Plaintiffs' free exercise claim. In the instant case, Plaintiffs generally aver:

> The a-g course requirements effectively provide (or are interpreted to provide) that specifically Christian content and viewpoints are disapproved and, if in the disapproved category, may not be added to standard course material, even though all the standard course material is taught, if the course and text is to meet a-g

> course requirements. This violates the freedom of religion of plaintiffs, and bars admission to the University of California on account of religion. It also abridges the right of Christians to assemble and associate in Christian schools, and to speak freely about their Christian beliefs, and for parents to train their children in their religious faith.

(Compl. ¶77.) A complaint shall not be dismissed under Rule 12(b)(6) "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Balistreri*, 901 F.2d at 699. Viewing Plaintiffs' allegations in the light most favorable to Plaintiffs, as the Court must, the Court determines that Plaintiffs have stated a valid free exercise of religion claim. Plaintiffs have adequately shown that they have been put to the choice between providing and taking courses that promote a biblical moral view or complying with the UC's a-g course requirements. Because Plaintiffs have alleged that the a-g course requirements place a burden on their religion, Defendants' Motion to Dismiss Plaintiffs' free exercise claim is DENIED.

3. Freedom of Association Claim

Defendants also dispute Plaintiffs' freedom of association claim. In *Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984), the Supreme Court clearly identified the two lines of decisions protecting the freedom of association. First, the freedom of private association protects "choices to enter into and maintain certain intimate human relationships...against undue

intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme." *Id.* at 617-18. Second, the freedom of expressive association is protected "for the purpose of engaging in those activities protected by the first Amendment-speech, assembly, petition for the redress of grievances, and the exercise of religion." *Id* at 618. Government interference with one type of associational freedom will often [13]burden the other type as well. *Bd. of Dirs. of Rotary Intern. v. Rotary Club of Duarte*, 481 U.S. 537, 544 (1987).

Here, Plaintiffs claim that the a-g course requirements effectively prevent the addition of Christian content and viewpoints to standard course material if the course is to meet a-g course requirements. (Compl. ¶77.) Plaintiffs further argue that the a-g course requirements "abridge[] the right of Christians to assemble and associate in Christian schools, and to speak freely about their Christian beliefs." (Compl. ¶ 77.) Plaintiffs' Opposition to the instant Motion echoes an allegation put forth in the Complaint's section on the First Cause of Action, paragraph 61:

> The Plaintiff students would otherwise qualify for admission to UC-their standardized scores are in the top 15%-except for the school they chose and the *shared viewpoints* there-which means that they are ineligible for admission to UC unless they are in the top 2-4% under the alternatives, if they choose disqualified courses with a Christian perspective or if Defendants

> implement their new approach to disqualify most of the other courses.

(Pls.' Opp'n 11 (emphasis added).) Insofar as Plaintiffs' claim is based on their right to congregate to share and discuss their viewpoints, in this case Christian viewpoints, and the effect of the a-g course requirements preventing them from doing so, Plaintiffs have stated a claim for a violation of their freedom of association. Hence, Defendants' motion to Dismiss Plaintiffs' freedom of association claim is DENIED.

4. Fourteenth Amendment Procedural Due Process Claim

Defendants also request that this Court dismiss Plaintiffs' federal procedural due process claim. Defendants are constrained from making decisions depriving Plaintiffs of "liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment." *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976). Some interests are "protected...because they are guaranteed in one of the provisions of the Bill of Rights which has been 'incorporated' into the Fourteenth Amendment." *Paul v. Davis*, 424 U.S. 693, 711 n.5 (1976). Property interests, on the other hand, "are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law...." *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 577 (1972).

[14]Defendants challenge Plaintiffs' federal procedural due process claim with two arguments. First, Defendants contend that Plaintiffs have failed to allege deprivation of a previously possessed property or liberty. (Defs.' Mot. 15.) Second, Defendants also assert that Plaintiffs "have no legal entitlement...to have any particular classes designated as meeting the a-g requirements, and they do not have any legal entitlement to attend the University other than in compliance with its admissions criteria." *Id.*

Plaintiffs counter by identifying a host of First Amendment rights that are discussed in the Complaint, along with the right to be nondisciminatorily considered for university admission as a property interest. (Pls.' Opp'n 12.) The Supreme Court has found that the application of the due process provision of the Fourteenth Amendment extends at least to the rights of speech, press, and religion under the First Amendment. *Duncan v. State of La.*, 391 U.S. 145, 147-48 (1968). Plainly, Plaintiffs have identified their deprived liberty interests as those encompassed within the First Amendment, including free speech (Compl. ¶ 81) and academic freedom, *id* ¶84, thereby defeating Defendants' first challenge to Plaintiffs' procedural due process claim.

The analysis for Defendants' second challenge is more involved. Although Plaintiffs assert that they have a property interest in the "right to be nondiscriminatorily considered, once California established universities" (Pls.' Opp'n 12), Plaintiffs' citation to *Goss v. Lopez*, 419 U.S. 565, to support

such an assertion is unconvincing. In *Goss*, the persons claiming a property interest in a public education did so on the basis of state laws that required both the provision and the receipt of the benefit. *Id.* at 573. Here, it is unclear what exactly is the basis for Plaintiffs' purported property interest in the "right to be nondiscriminatorily considered." Hence, Plaintiffs have failed to identify a property interest for their federal due process claim. However, because Plaintiffs have identified several First Amendment liberty interests, Defendants' Motion to Dismiss this procedural due process claim is DENIED.

5. Unconstitutional Condition

Defendants contend and Plaintiffs agree that the University's admissions criteria are not an unconstitutional condition. (Defs.' Mot. 15; Pls.' Opp'n 12.) However, Plaintiffs assert that [15] "recent changes to require not just subject areas, but approved and nondisqualified viewpoints and content regulation, do create an unconstitutional condition." (Pls.' Opp'n 12-13.)

According to the Supreme Court, "the government may not deny a benefit to a person on a basis that infringes his constitutionally protected...freedom of speech even if he has not entitlement to that benefit." *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 126 S. Ct. 1297, 1307 (2006) (citations omitted). The unconstitutional conditions doctrine extends to other "constitutionally protected interests" in addition to the freedom of

speech. *Perry v. Sindermann*, 408 U.S. 593, 597 (1972).

As Defendants have noted, the court's determination of the existence of an unconstitutional condition takes place in sequence. "As a prerequisite to discerning a constitutional violation for an unconstitutional condition...we must first examine the validity of the underlying alleged constitutional rights." *Vance v. Barrett*, 345 F.3d 1083, 1088 (9th Cir. 2003) (citations omitted). *See also, Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 286 (1998) (declining to address respondent's unconstitutional conditions argument by first finding no constitutional violation). Accordingly, Defendants' defense of its standards as not being an unconstitutional condition is premature; although this Court has found that Plaintiffs have alleged sufficient facts for Plaintiffs' constitutional rights claims against Defendants to go forward, this Court has yet to "examine the validity of the underlying alleged constitutional rights." *Vance* 345 F.3d at 1088. Hence, the Court declines to consider either Defendants' argument of there being no unconstitutional condition or Plaintiffs' argument of the existence thereof.

B. Defendants Subject to Suit

In order for this action to move forward, the Defendants must be subject to suit. Defendants contend that as an arm of the state of California, the UC Regents (along with its operating units Board of Admissions and Relations with Schools (BOARS) and Office of the President (UCOP)) is not subject to suit

under 41 U.S.C. § 1983, under which Plaintiffs bring this action.

A state and its officers sued in their official capacity are not subject to suit under 42 U.S.C. § 1983, as they are not considered "persons" within the meaning of the statute. *Cortez v.* [16]*County of Los Angeles*, 294 F.3d 1186, 1188 (9th Cir. 2002). "States or governmental entities that are considered 'arms of the state' for Eleventh Amendment purposes" are excluded from the definition of "persons" in § 1983. *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 70 (1989). Because the UC Regents is considered an arm of the state under the Eleventh Amendment, it therefore is not considered a "person" subject to suit under 42 U.S.C. § 1983. *Thompson v. City of Los Angeles*, 885 F.2d 1439, 1443 (9th Cir. 1989). Clearly, Plaintiffs may not sue the UC Regents under 42 U.S.C. § 1983 as they might any other "person."

Plaintiffs make three arguments to try to convince this Court that the UC Regents is nonetheless subject to suit. Plaintiffs' first argument, that the UC Regents is subject to suit as a state officer under *Ex parte Young*, 209 U.S. 123, 160 (1908), is unconvincing. *Ex parte Young* stands for the proposition that "a suit challenging the constitutionality of a state official's action is not one against the estate." *Pennhurst State Sch. & Hosp. v. Halderman*, 405 U.S. 89, 102 (1984). Although this exception to the doctrine of sovereign immunity allows state officers to be sued, Plaintiffs' citation to *Regents v. Super. Ct. of Los Angeles County*, 3 Cal. 3d 529, 536 39, 131 Cal. Rptr. 228, 230 (1976), is hardly sufficient to overcome the plethora of cases explicitly

excluding the UC Regents from suit under 42 U.S.C. § 1983. As Defendants point out in their Reply, *Regents v. Super. Ct. of Los Angeles County* held only that the UC Regents is an "officer" for specific California venue laws. Plaintiffs' expansive reading here of the California Supreme Court's holding is unmerited. In the absence of convincing authority that the UC Regents is indeed and "officer" for purposes of *Ex parte Young*, Plaintiffs' first argument fails.

Plaintiffs next argue that the UC Regents enjoys Eleventh Amendment immunity only in limited functions and not in this situation. Certainly, the UC Regents' immunity from suit is not all-encompassing of the University's many functions. In *Doe v. Lawrence Livermore Nat'l Lab.*, 65 F.3d 771 (9th Cir. 1995), *rev'd on other grounds sub nom. Regents of the Univ. of Cal. V. Doe*, 519 U.S. 425 (1997), the Ninth Circuit employed a five-factor analysis to determine if the University, "acting in a managerial capacity for the Laboratory, is an arm of the state and thus is entitled to Eleventh Amendment immunity from suit in federal court." *Lawrence Livermore Nat'l Lab*, 65 F.3d at 774. The California Supreme Court has also limited the UC Regents' sovereign immunity. *See,* [17]*e.g. Regents v. Super. Ct.*, 17 Cal. 3d 533, 537 (1976) (declining to extend sovereign immunity to the University's lending decisions in investment of portfolio). Plaintiffs also point to an number of suits brought against other states' equivalents of the Regents that were allowed by the U.S. Supreme Court without discussion of sovereign immunity. (Pls.' Opp'n 15.) In addition, Plaintiffs cite to a matter in the

Northern District of California that allowed an injunctive relief suit against the UC Regents to go forward, *McVey v. Bd. of Regents of the Univ. of Cal.*, 165 F. Supp. 2d 1052, 1057 (N.D. Cal. 2001). Despite Plaintiffs' apparent urging of this Court to simply rely on past instances in which the UC Regents (or other states' equivalents) has been subject to suit, without clear authority supplying this Court with a rationale for doing so, this argument necessarily fails.

Finally, Plaintiffs argue that "applying the Ninth Circuit's five-factor test to the function of Regents that regulates course content or approved viewpoints of nonpublic schools" will convince this Court that the UC Regents is subject to suit. (Pls.' Opp'n 16.) The five factors in the Ninth Circuit's test are:

> (1) whether a money judgment would be satisfied out of state funds, (2) whether the entity performs central governmental functions, (3) whether the entity may sue or be sued, (4) whether the entity has power to take property in its own name or only the name of the state, ad (5) the corporate status of the entity.

ITSI TV Prods. v. Agric. Ass'ns, 3 F.3d 1289, 1292 (9th Cir. 1993). Without question the single most important factor in the analysis is whether the state would be liable for a money judgment against the defendant. *Lawrence Livermore Nat'l Lab.*, 65 F.3d at 774; *Jackson v. Hayakawa*, 682 F.2d 1344, 1350 (1982). Here, Plaintiffs do not seek money damages; they seek only injunctive and declaratory relief. (Pls.' Opp'n 19.) In such a case it would appear that

the first and more weighty factor on its face weighed in favor of finding the UC Regents as not being an arm of the state. However, past authority would support the opposite result.

First, the Supreme Court, in its reversal of the Ninth Circuit decision in *Lawrence Livermore Nat'l Lab.*, 65 F.3d 771 (finding the University in its function there to not be an arm of the state), took issue with the Ninth Circuit's characterization of the government's indemnification of the University as weighing the first factor against granting the University Eleventh Amendment [18]immunity from suit in federal court. *Regents of the Univ. of Cal. v. Doe*, 519 U.S. 425, 431 (1997). The Court there stated "that with respect to the underlying Eleventh Amendment question, it is the entity's potential legal liability...that is relevant." *Id.* It is true that here there is no potential legal liability, as Plaintiffs do not seek money damages. However, the fact that Plaintiffs are not pursuing money damages does not alter the relationship between the state of California and the University. If Plaintiffs were seeking money damages, it would be the state of California to which they would look. Hence, the first factor should weigh in favor of granting the UC Regents immunity from suit.

Second, the Ninth Circuit has addressed the situation where the appellant sought both damages and injunctive relief against an appellee that claimed Eleventh Amendment immunity. *Mitchell v. Los Angeles Cmty. Coll. Dist.*, 861 F.2d 198 (9th Cir. 1988). There, after only limited discussion of the first factor in its five-factor analysis, the Ninth

Circuit found that the appellee, a school district, was entitled to Eleventh Amendment immunity from the appellant's 42 U.S.C. § 1983 claim in damages *and* for injunctive relief. *Id.* at 201. There was no separate analysis of the claim due to the fact that injunctive relief was sought; that the first factor in the analysis did not apply to the plaintiff's request for injunctive relief did not matter in the court's decision to grant Eleventh Amendment immunity from the § 1983 claim for both types of relief. Here, although money damages are not being sought, it is not apparent that such absence makes any difference to the five-factor analysis as would be conducted if Plaintiffs did request damages. Hence, again, the first factor would weigh in favor of granting the UC Regents immunity from suit.

Third, the Supreme Court has stated that sovereign immunity is not limited to suits seeking money damages. "'This jurisdictional bar [under the Eleventh Amendment] applies regardless of the nature of the relief sought.'" *Pennhurst*, 465 U.S. 89, 100. Further, the Court has equated the effect of money damages with that of injunctive relief, at least in noting what it is that qualifies a suit as being against a sovereign. "'The general rule is that suit is against the sovereign if 'the judgment sought would expend itself on the public treasure or domain...,' or if the effect of the judgment would be 'to restrain the Government from acting, or to compel it to act.'" *Id.* at 102 n.11 (citations omitted). Here, in this Eleventh Amendment analysis, given the Supreme Court's **[19]**characterization of suits against a sovereign, it is not evident that Plaintiffs' choice not to seek money damages makes this suit

any less against a sovereign entity and, thereby, entitled to sovereign immunity. Hence, the first factor does not weigh against granting the UC Regents immunity from suit.

The analysis for the other factors is similar to the analysis performed by the Ninth Circuit in *Lawrence Livermore Nat'l Lab.* and is not repeated here. Because the first and most important factor weighs in favor of finding UC Regents immune from suit in federal court, which is not overcome by the other factors in the analysis, the Ninth Circuit five-factor test supports the proposition that the UC Regents should be found to be an arm of the state. Therefore, the UC Regents is entitled to Eleventh Amendment immunity from suit in federal court, and the claims against the UC Regents (including its operating units BOARS and UCOP)[5] are DISMISSED.

C. Federal Jurisdiction for State Law Claims

Plaintiffs and Defendants agree that claims based on violations of state law, made against state officers in their official capacity cannot be decided. (Defs.' Mot. 18; Pls.' Opp'n 17.) However, the officers here are also sued in their individual, or personal, capacity. Defendants do not disagree that federal courts may decide state law claims against state officers in their personal capacity, but only if the suit is for damages. (Defs.' Reply 5.) Plaintiffs, however, assert that the jurisdiction of federal courts are not

[5] Plaintiffs admit that they "have not found clear authority that [BOARS and UCOP] are entities. (Pls.' Opp'n 17.)

limited to suits for damages, but generally covers claims against state officers acting in their personal capacity. (Pls.' Opp'n 18.)

The Eleventh Amendment bars suits against a state in federal court without the state's explicit consent. *In re State of N.Y.*, 256 U.S. 490, 497 (1921). This jurisdictional bar applies not only when the state is the named party, but also when it is the party in fact. *Edelman v. Jordan*, 415 U.S. 651 (1974). "The general rule is that relief sought nominally against an officer is in fact against the sovereign if the decree would operate against the latter." *Haw. V. Gordon*, 373 U.S. 57, 58 (1963) (per curiam). An exception to the Eleventh Amendment bar exists to allow suits**[20]**challenging the constitutionality of a state official's action. *Ex parte Young*, 209 U.S. 123. However, this exception exists only for federal claims seeking prospective injunctive relief. *Ulaleo v. Paty*, 902 F.2d 1395 (9th Cir. 1990) (citation omitted). Further, *Ex parte Young* is "inapplicable in a suit against state officials on the basis of state law." *Pennhurst*, 465 U.S. at 106.

Defendants contend that Ninth Circuit authority "prohibits federal courts from deciding state law claims for injunctive or declaratory relief against state officials." (Defs' Mot. 18.) Such prohibition, Defendants claim, extends to "personal-capacity claims for injunctive or declaratory relief under state law." (Defs.' Reply 5.) In support of their argument, Defendants cite three cases. Indeed, the courts in *Air Transp. Ass'n of Am. v. Pub. Utils. Comm'n of the State of Cal.*, 833 F.2d 200 (9th Cir. 1987), *Hand v. U.S. Dep't of Justice*, 45 F.3d 333 (9th Cir. 1994), and

Leventhal v. Vista Unified Sch. Dist., 973 F. Suppl 951 (S.D. Cal. 1997), cite *Pennhurst* as standing for the proposition that federal courts are barred by the Eleventh Amendment from deciding state law claims for injunctive or declaratory relief against state officials.[6] Yet there is no discussion in these cases of the difference, if any, in the treatment of suits against state officials in their official or personal capacity.

Another Ninth Circuit case, *Ashker v. Cal. Dep't of Corr.*, 112 F.3d 392, 394 (9th Cir. 1997), sheds more light on the Supreme Court's rationale for finding some cases to be barred by the Eleventh

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[6] In *Air Transp. Ass'n of Am. v. Pub. Utils. Comm'n of the State of Cal.*, 833 F.2d 200 (9th Cir. 1987), the plaintiffs sought declaratory relief and an injunction to enjoin the enforcement of a regulation promulgated by the California Public Utilities Commission. The Ninth Circuit cited *Pennhurst* as standing for the proposition that the Eleventh Amendment "bars claims in federal court against state officials based on state law violations." 833 F.2d at 204 (citation omitted). The court subsequently declared the plaintiffs' claim barred by the Eleventh Amendment.

In *Han v. U.S. Dep't of Justice*, 45 F.3d 333 (9th Cir. 1994), the plaintiffs sought what the court held to be a retrospective remedy and the Ninth Circuit against cited *Pennhurst* in declaring itself "barred by the Eleventh Amendment from deciding claims against state officials based solely on state law." 45F.3d at 339 (citation omitted).

In *Leventhal v. Vista Unified Sch. Dist.*, 973 F. Supp. 951 (S.D. Cal. 1997), the plaintiffs brought suit against school board members in their official capacity, seeking injunctive and declaratory relief. The district court there cited *Pennhurst* for he proposition that the "Eleventh Amendment bars federal courts from granting injunctive relief against state officials for violations of state law." 973 F.Supp. at 956.

Amendment while others are not. In *Asker,* the Ninth Circuit described *Pennhurst* as [21]standing for the proposition that the "Eleventh Amendment barred a federal district court from hearing a supplemental state law claim for an injunction against a state officer acting in his *official* capacity." *Ashker*, 112 F.3d at 394 (emphasis in original). The court went on to discuss the question of suit against an officer in his or her personal capacity on a state law claim for money damages, the issue of a similar suit, but such a claim for injunctive relief was not discussed. However, the Ninth Circuit did take the opportunity to note that in *Pennhurst*, 465 U.S. 89, "[t]he Supreme Court observed that 'a federal suit against state officials on the basis of state law contravenes the Eleventh Amendment when – as here-the relief sought and ordered has an impact directly on the State itself.'" *Ashker*, 11 F.3d at 394. This statement suggests that, in determining whether claims are barred by the Eleventh Amendment, the Supreme Court primarily considers whether such relief would directly impact the state itself. Hence, a state claim for injunctive relief against a state official, in either his or her official or individual capacity, would be barred in federal court, as such relief would necessarily "have an impact directly on the State itself."

In contrast, Plaintiffs cite Ninth Circuit authority to contend that *Pennhurst* is inapposite to the matter at hand. First, Plaintiffs cite *Demery v. Kupperman*, 735 F.2d 1139, 1150-51 (9th Cir. 1984), to stand for the proposition that "*Pennhurst* addressed only official capacity claims, and not personal capacity claims under state law." (Pls.'

Opp'n 17.) Indeed, the Ninth Circuit in *Demery* addressed the situation where a §1983 suit seeking money damages was brought against the defendants in their individual capacity. There, the Ninth Circuit declined to find that the Supreme Court's ruling in *Pennhurst* prevented the bringing of suit in federal court against state officials in their individual capacity to damages.[7] *Demery*, 735 F.2d at 1151.

Next, Plaintiffs assert that the Ninth Circuit addressed the issue of personal capacity claims under state law in *Pena v. Gardner*, 976 F.2d 469, 473-74 (9th Cir. 1992), holding that "*Pennhurst* did not address, and does not apply to, personal capacity claims under state law." (Pls.' Opp'n **[22]**17.) In *Pena*, the Ninth Circuit found that the Eleventh Amendment did not bar the plaintiff's pendent state claims against state officials acting in their individual capacity. *Pena*, 976 F.2d at 474. Notably, the plaintiff in *Pena* did not seek prospective injunctive relief, as Plaintiffs do here.[8]

Despite Plaintiffs' attempts to distance *Pennhurst* from the instant matter, the Court is unconvinced that the Eleventh Amendment does not bar from federal court suits containing state claims for injunctive or declaratory relief against state officials in his or her persona capacity. Clearly, in

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[7] The Supreme court indirectly agreed with the Ninth Circuit's reading of *Pennhurst in Hafer v. Melo*, 502 U.S. 21 (1991) (allowing suit for monetary damages and reinstatement against state official in her individual capacity).

[8] "Pena did not request injunctive relief in his original complaint." *Pena*, 976 F.2d at 473 n.5.

Pena, the Ninth Circuit "held that the Eleventh Amendment would not bar federal or pendent state claims seeking *damages* against a state official acting personally." *Ashker*, 112 F.3d at 394-95 (citation omitted) (emphasis added). However, the Ninth Circuit in *Pena* appears to have decided on a narrower question than Plaintiffs contend that they did. In other words, the Ninth Circuit did not conclusively decide in *Pena* if the Eleventh Amendment bars state claims seeking injunctive or declaratory relief against a state official acting personally.

"A federal court is presumed to lack jurisdiction in a particular case unless the contrary affirmatively appears." *Stock West, Inc. v. Confederated Tribes*, 873 F.2d 1221, 1225 (9th Cir. 1989) (citation omitted). As such, given that Plaintiffs have failed to convince this Court that *Pennhurst* is not instructive for the issue at hand, and given the Supreme Court's observation that the Eleventh Amendment bars in federal court state law claims against state officials that seek relief that has an impact directly on the state itself, this Court decline to find that jurisdiction exists over Plaintiffs' state law claims. Hence, Defendants' Motion to Dismiss Plaintiffs' state law claims is GRANTED.

D. "Individual Capacity" Claims

Defendants request that claims against Defendants in their "individual capacity" be dismissed. Defendants assert that suits against officials in their individual capacity are "appropriate only where plaintiffs seek damages to be paid out of

the official's personal assets or action by the individual personally, rather then [sic] as a government official." (Defs.' Mot. 19) [23]Plaintiffs counter that personal capacity suits for injunctive or declaratory relief, as here, are proper and are allowed. (Pls.' Opp'n 18.)

At the least, Defendants' reliance on the Supreme Court's discussion in *Ky. v. Graham*, 473 U.S. 159, 165-66 (1985), of the difference between personal capacity and official capacity suits, to mandate their position is misplaced. As Plaintiffs have stated in their Opposition (Pls.' Opp'n 18), the Supreme Court's discussion in *Graham*, merely gave "concrete examples of the practical and doctrinal differences between personal and official capacity actions" because "this distinction [between the two types of actions] continues to confuse lawyers and confound lower courts." 473 U.S. at 165. There is no indication in *Graham* that the Supreme Court meant to limit or delineate the capacity in which future plaintiffs should bring particular kinds of suit against state official defendants. *See Hafer v. Melo* 502 U.S. 21, 25 (1991). Defendants' citation to *Am. Civil Liberties Union of Miss., Inc. v. Finch* 638 F.2d 1336, 1338 (5th Cir. 1981) is similarly flawed.

In support of Plaintiffs' argument that personal capacity suits may be for injunctive or declaratory relief, Plaintiffs assert that *Ex parte Young* suits and § 1983 suits are personal capacity suits. (Pls.' Opp'n 19.) Defendants contend that *Ex parte Young* suits are, rather official-capacity suits. (Defs.' Reply 5.) Indeed, the legal fiction that the Supreme Court created in *Ex parte Young* to bypass the Eleventh

Amendment allowed for suit to be brought against the unconstitutional conduct of an official. The fiction postulates that "[the officer] is in that case stripped of his official or representative character and is subjected in his person to the consequences of his *individual* conduct." *Ex parte Young*, 209 U.S. at 160 (emphasis added). Such description of how it is that suit is allowed to be brought against what ostensibly are the actions of an official simply carrying out his or her duties, appears to indicate that the official there is subjected to suit in his or her individual capacity. However, additional Ninth Circuit and Supreme Court case law would indicate that Defendants' interpretation of *Ex parte Young* ultimately prevails.

Indeed, the Ninth Circuit has characterized *Ex parte Young* suits as where "a state official in his or her *official* capacity, when sued for injunctive relief, [is] a person under § 1983, because 'official-capacity actions for prospective relief are not treated as actions against he State.'" *Wolfe* [24]*v. Strankman*, 392 F.3d 358, 365 (9th Cir. 2004) (internal citation sand quotation marks omitted) (emphasis added). In making this observation, the Ninth Circuit drew upon Supreme Court case law. *Id.* Clearly, the legal fiction that the Supreme Court created in *Ex parte Young* is, at best, only a fiction, and suit brought under *Ex parte Young*, although perhaps *treated* as a personal capacity suit,[9] is *actually* brought against officials in their official capacity.

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[9] "An *Ex parte Young* suit is treated as a personal capacity suit: 'Under the doctrine of *Ex parte Young*, courts treat a suit against a state officer to enjoin a violation of federal law as an

Plaintiffs also argue that "a Section 1983 suit...is normally a personal capacity suit" and cites to *Hafer*, 502 U.S. 21, in support of this contention. (Pls.' Opp'n 19.) The Court agrees that a § 1983 suit may be brought against an official in his or her personal capacity. However, no authority has been presented that would indicate that a § 1983 suit is "normally a personal capacity suit." Without conclusive authority indicating that Plaintiffs may sue Defendants in their "individual capacity" for injunctive and declaratory relief this Court declines to allow these claims to go forward. Hence, Defendants' Motion to Dismiss claims against certain Defendants in their "individual capacity" is GRANTED.

E. Claims Against Dennis J. Galligani

Apparently, Dennis J. Galligani has retired from the position of Associate Vice President for Student Academic Services. (Defs.' Mot. 20.) Defendants request that this Court dismiss Mr. Galligani as a defendant *Id.* Plaintiffs argue that "Mr. Galligani's successor should be substituted hen he or she takes office." (Pls.' Opp'n 20.) Federal Rule of Civil Procedure 25(d)(1) specifies that substitution is the proper course to take. Defendants fail to advance any reason why this Court should deviate from such course. Hence, Defendants' Motion to Dismiss Mr. Galligani as a defendant is DENIED. Of course, in light of the Court's granting of Defendants' Motion to

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individual-capacity suit...' *Moore's Federal Practice* § 123.40[3][b] (2005)." (Pls.' Opp'n 19.)

Dismiss claims against certain Defendants in the "individual capacity," claims against Mr. Galligani are limited to federal claims against him in his official capacity.

[25]IV. CONCLUSION

For the foregoing reasons, the Court DENIES Defendants' Motion to Dismiss Plaintiffs' First, Second, Third and Fourth Causes of Action. In additional, the Court GRANTS Defendants' Motion to Dismiss all claims against the UC Regents, the components of Plaintiffs' First, Second, Third, Fourth, Fifth and Sixth Causes of Action that are based on California law, and all claims against any of the Defendants in their individual capacity. Moreover, this Court DENIES Defendants' Motion to Dismiss claims against Dennis J. Galligani in his official capacity.

To the extent that the Court GRANTS Defendants' Motion, Plaintiffs' claims are dismissed with prejudice. The filing of an Amended Complaint is not required. Defendants have twenty (20) days to answer the reminder of the Complaint.

IT IS SO ORDERED.

APPENDIX E

UNITED STATES COURT OF APPEALS,
NINTH CIRCUIT.

No. 08-56320

ASSOCIATION OF CHRISTIAN SCHOOLS INTERNATIONAL, ET AL., v. ROMAN STEARNS, ET AL.,

March 1, 2010.

Before: HALL, THOMPSON and SILVERMAN, Circuit Judges.

Judge Silverman has voted to deny the appellants' petition for rehearing by the court en banc, and Judges Hall and Thompson have recommended denial of that petition.

The full court has been advised of the petition for court rehearing en banc, and no judge of the court has requested en banc rehearing. See Fed. R. App. P. 35(b).

The petition for rehearing by the court en banc is DENIED.

APPENDIX F

UNIVERSITY OF CALIFORNIA BOARD OF ADMISSIONS AND RELATIONS WITH SCHOOLS SUBCOMMITTEE ON HIGH SCHOOL ARTICULATION

Statement on Religion and Ethics Courses

In order, to be considered as history, social science, and English courses, courses in religion or ethics taught in schools should have the following characteristics in order to satisfy the 'f' requirement:

1. The course should treat the study of religion or ethics from the standpoint of scholarly inquiry rather than in a manner limited to one denomination or viewpoint.

2. The course should not include among its primary goals the personal religious growth of the student.

BOARS wishes to reiterate its recognition that there are many courses which are valuable for the student and appropriate for the setting in which they are given but which do not meet the 'f' requirement for admission to the University. Failure to meet the 'f' requirement does not detract from the value of such courses but simply means that BOARS would not want to see the student take them to the exclusion of other courses described in the 'f' requirement

APPENDIX G

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. CONSTITUTION

FIRST AMENDMENT

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

FOURTEENTH AMENDMENT

SECTION 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

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Supreme Court, U.S.
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No. 09-1461

IN THE

Supreme Court of the United States

ASSOCIATION OF CHRISTIAN SCHOOLS INTERNATIONAL, *et al.*,
Petitioners,

v.

ROMAN STEARNS, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Where the evidence shows that the course review policy of the University of California ("UC") both (a) provides for approval (for credit toward guaranteed admission to UC) of high school courses that are sufficiently rigorous regardless of whether the courses "add a religious viewpoint" and (b) is academically reasonable on its face and as applied, did the courts below err in rejecting Petitioners' constitutional challenges to that policy?

2. When the government provides a public service that by its nature requires evaluations and distinctions based on the content of speech, does heightened First Amendment scrutiny apply absent evidence of invidious viewpoint discrimination?

3. Where Petitioners waived as-applied challenges that were dependent on their assertion of associational standing, and Petitioners' as-applied challenges would in any event not implicate any purported circuit split regarding associational standing doctrine, is this case a good vehicle for resolving any minor circuit court disagreements about that doctrine?

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CONSTITUTIONAL PROVISIONS

First Amendment 25, 26

IN THE

Supreme Court of the United States

No. 09-1461

ASSOCIATION OF CHRISTIAN SCHOOLS INTERNATIONAL, *et al.*,
Petitioners,

v.

ROMAN STEARNS, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Petitioners challenge the University of California's ("UC") policy of reviewing California high school courses to determine whether performance in those courses may be used to gain guaranteed admission to UC, a policy whose purpose is to ensure that admitted students will be well prepared for study at the University.[1] Petitioners allege that UC denies approval to courses that teach "standard content" merely because those courses "add a religious viewpoint." But both the district court and the Ninth

[1] Respondents are or were individual UC employees, all of whom were sued in their official capacities.

Circuit held this allegation is unsupported. Both courts found the uncontroverted evidence to demonstrate that UC does not discriminate based on the presence of religious viewpoints and that UC's policy is academically reasonable on its face and as applied.

I. THE COURTS BELOW CORRECTLY FOUND THAT UC'S COURSE REVIEW POLICY IS ACADEMICALLY REASONABLE AND DOES NOT SUBSTANTIALLY BURDEN PETITIONERS

UC is one of the world's great universities. UC guarantees admission to all "eligible" California students. SER[2] 3653; Appendix to Petition for a Writ of Certiorari ("App.") 46a. Most students become eligible by achieving sufficiently high grades in courses in specified subject areas and scores on standardized tests. *Id.* UC's course review policy ensures that grades on which students rely have been earned in courses that are truly preparatory for study at the University. App. 48a. Nothing in Petitioners' religion is inconsistent with teaching such courses, and most members of Petitioner Association of Christian Schools International ("ACSI") do teach such courses.

A. There Are Multiple Paths to UC Eligibility

1. Eligibility in the Statewide Context

Under the most common path to eligibility, "Eligibility in the Statewide Context," students must demonstrate proficiency in the "a-g" subject areas.

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[2] "ER" and "SER" refer to the Ninth Circuit Excerpts of Record and Supplemental Excerpts of Record.

SER 3654. Students have several ways to demonstrate proficiency, including by earning good grades in approved courses (approximately 3.75 courses per high school year) and/or scoring in the top two thirds of test takers on SAT II subject tests. SER 3654-56, 3659-73.[3]

a. a-g courses and course review

The a-g course requirements are:

"a": two years history/social science;

"b": four years English;

"c": three years mathematics;

"d": two years laboratory science;

"e": two years of another language;

"f": one year visual/performing arts;

"g": one elective.

SER 1453-61. Most students take additional courses not qualifying for a-g credit. SER 167-68.

To obtain approval of their courses for a-g credit, California high schools must submit course descriptions to UC.[4] UC then considers whether the courses "involve[] substantial reading and writing," show serious attention to "both analytical thinking and

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[3] This is the most common path to what Petitioners call "regular admission." *See* Petition at 4. Because of the SAT II option, among others, a student from a school without an approved a-g curriculum is *not*, as Petitioners claim (*id.* at 5), "ineligible for regular admission." App. 47a n.3.

[4] Contrary to Petitioners' claim that course descriptions are one to five pages long, Petition at 4, the district court found that submissions are typically three to five pages long. App. 48a.

factual content," are academically challenging, and will sufficiently prepare students for UC. App. 49a.

To assist schools and guide UC's course reviewers, UC maintains a dedicated website, containing extensive interpretive notes, "helpful hints," hundreds of pages of sample course descriptions, and two "Statements of Competencies." SER 178, 873, 1226-2827. Reviewers obtain additional guidance from faculty and the Academic Senate's Board of Admissions and Relations with Schools ("BOARS"). SER 3676-77, 179. Reviewers apply the same standards to courses from religious and non-religious schools. *See, e.g.*, SER 78, 124-25, 275, 929-35. Course approval rates for ACSI schools are similar to those for other schools and higher than for some categories of public schools. SER 297-98, 309.

If UC disapproves a course, it explains why. *E.g.*, SER 145-64, ER 2193-94. Schools may resubmit courses with either revisions or an explanation of why the disapproval was mistaken. SER 127-28, 139-40, 143.

b. SAT II tests

Students may also satisfy a-g subject areas (except the "f" Visual and Performing Arts area) by scoring in the top two thirds of test takers on the relevant SAT II tests. SER 3655-56, 3659-73.[5] Several ACSI schools, including Petitioner Calvary Chapel Christian School ("Calvary"), testified that they advise students of this alternative. SER 2944-68.

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[5] UC also allows students to satisfy a-g areas with International Baccalaureate or Advanced Placement exams or college courses. App. 47a.

2. Other Eligibility Paths

Students may also become eligible for admission by:

- placing in the top 4% of students (by GPA in a-g courses) at their school ("Eligibility in the Local Context") (SER 3002, 3656-57);
- receiving sufficiently high standardized test scores (SER 3003, 3657); or
- demonstrating potential to succeed based on campus-specific criteria (SER 3004, 3657).

B. UC's Policy Is a Reasonable Exercise of Academic Judgment

UC's policy reflects a decades-long faculty consensus about the academic value of having standards for those high school courses in which a student's grades can be used to qualify for University admission. SER 325-26, 3677. The policy helps ensure that students:

(1) Can participate fully in the first year UC program in a broad variety of fields;

(2) Have necessary preparation for UC courses, majors, and programs;

(3) Have knowledge that provides breadth and perspective to new, more advanced studies; and

(4) Have essential critical thinking and study skills.

SER 1453. As the district court found, it is uncontroverted that the faculty's goals are legitimate and the policy is a reasonable means to meet them. App. 67a.

Dr. Michael Kirst, an expert on college-preparatory curricula and admission standards, testified that

course content is a "crucial variable in predicting whether students will succeed at very selective post-secondary institutions such as [UC]." *Id.* Because taking courses with merely the "right" *titles* does not indicate sufficient preparation, Kirst testified that UC's guidelines and course review are reasonable ways to ensure that admitted students are prepared. *See id.;* SER 2840-45, 2847-49, 2853.

As the district court recognized, Petitioners' education experts agreed that content- and knowledge-based admission requirements are educationally reasonable. App. 67a-68a. Petitioners' experts testified that, the more information a university reviews about students' preparation, the better its admissions process. SER 3600-08. They also agreed that the course descriptions submitted to UC give guidance about the content actually taught. SER 3609-18.[6] One of Petitioner's experts specifically testified that UC's course review "would give a better indication of what was actually taught in the course than a course title." SER 3621. Further, Petitioners' experts testified that it is reasonable to use standardized tests to gauge college preparedness, as UC does when a-g areas are not satisfied by coursework. SER 3628-35. Petitioners' experts additionally believe it is educationally reasonable that students not be excused from these requirements on religious grounds. SER 3575-88.

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[6] ACSI itself similarly requires schools to prepare course descriptions for its review in assessing whether to grant accreditation. SER 3623-26.

C. A-g Courses Are Not Inconsistent with Petitioners' Religion

Petitioners' religion does not forbid ACSI schools from teaching any material required for a-g approval. Petitioners "hold a . . . religious faith that they *should* present and study . . . all standard subject matter in science." *Id.*; *see also* ER 1322-30 (same for other subjects); SER 3068.01-3068.03, 3070.

Petitioners' religion also does not require teaching, in an a-g subject, any material that would disqualify a course. Indeed, many ACSI schools offer a full set of a-g approved courses. SER 3072-381. ACSI's President and ACSI school representatives testified that they are unaware of any ACSI schools' a-g approved courses having content contrary to the ACSI Statement of Faith. SER 3382-84, 3405-34. Petitioner Calvary had a complete a-g curriculum during 2006-2007, and a Calvary representative testified that those courses were fully consistent with the school's Statement of Faith. SER 3126-29, 3405-08.

Virtually all schools offer additional courses not submitted for a-g credit. App. 3a; SER 3005-27. As one ACSI school testified, UC does not "regulate what [ACSI schools] may teach." SER 3402-04; *accord* SER 3028-68. For example, ACSI schools offer yearly Bible courses that most students take. SER 3514-26. If, in its Bible courses, a school wants to teach students to question scientific methodology or theories, that does not affect approval of the school's other courses or admission of its students. SER 167-68.

Petitioners have no religious objection to SAT II tests, and in fact tout standardized tests as the optimal means of determining college preparation. SER 2970-71, 3627-35. ACSI schools testified

uniformly that taking the SAT II does not interfere with students' exercise of religion. SER 2975-97. To the extent students "don't want to" take an SAT II test, it is not based on religion but, as one ACSI principal testified, because they would, for example, "rather watch the ball game." SER 2998-3001.

II. AS THE COURTS BELOW FOUND, THE COURSES AND TEXTS AT ISSUE DID NOT MEET UC'S LEGITIMATE EXPECTATIONS

No admissible evidence supports Petitioners' claim that UC disapproved courses because the courses "added" a "religious viewpoint" to "standard content." *E.g.*, Petition at 5, 6, 13. A course or text is not acceptable for a-g credit if it, among other things, fails to teach (1) topics with sufficient accuracy and depth or (2) relevant analytic skills. As the courts below found, the undisputed evidence is that the courses and texts at issue were denied approval because they were unacceptable under one or both of these measures.[7]

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[7] Petitioners refer repeatedly to "150 courses" rejected (*e.g.*, Petition at 11, 23), a phrase taken from the district court's Partial Summary Judgment Order: "Plaintiffs do not provide an analysis as to why any of the more than 150 courses rejected by UC should have been approved." App. 103a. As the Ninth Circuit recognized, Petitioners have still not provided any such analysis. App. 9a-10a.

It is not even clear to which courses Petitioners refer with their "150 courses" mantra. Petitioners cite two attorney "compilations" of snippets from different sets of disapproved courses, neither of which numbers 150. Petition at 11 (citing ER 443-86, 750-77). Moreover, as Respondents pointed out in the district court, those "compilations" are inadmissible because they lack foundation, do not properly authenticate the underlying documents, assume facts not in evidence, improperly

A. Biology

Many of the UC decisions Petitioners cited below for their claim that UC disapproves courses for "add[ing]" a "religious viewpoint" to "standard content" related to biology courses that were not approved for science credit because they use Bob Jones University Press ("BJU") or A Beka Book ("Beka") biology books as their primary text.[8] UC Professor and BOARS Chair Barbara Sawrey reviewed these textbooks and concluded they were inappropriate as primary texts in college preparatory science courses due to their characterizations of religious doctrine as scientific evidence, scientific inaccuracies, failure to encourage critical thinking, and overall un-scientific approach. App. 104a. The BOARS High School Subcommittee agreed. App. 105a.

These texts teach, for example, that: (1) conclusions reached by the scientific method are false if they conflict with the "Word of God" (App. 107a); (2) the theory of evolution is false (SER 575A, 602A, 638A, 647A); (3) the human life span averaged 912 years before Noah's flood created the fossil record (SER 582A, 584A); and (4) HIV is the result of immorality against God (SER 629A). All of this is presented as literally true.

UC faculty summarized the rationale for disapproving such courses in a Position Statement: "[T]hese texts teach students that their conclusions

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excerpt portions of quotations out of context, and cite documents never submitted to the courts below. SER 15-17.

[8] These biology courses are also a focus of the "compilations" of snippets from course-related documents cited in the Petition. *See supra* note 6.

must conform to the Bible, and that scientific material and methods are secondary." App. 104a n.36. The Position Statement nevertheless left open that otherwise adequate courses may obtain "d" credit using these as supplemental texts (ER 1477-82), as has occurred several times. *E.g.*, ER 10-11; SER 295 ¶ 7; SER 264-70. Thus, the University does not exclude courses that expose students to these ideas; it only requires that these ideas not be the exclusive framework for teaching science.

UC's experts, world-renowned biologists and university professors Donald Kennedy and Francisco Ayala, agreed that use of a BJU or Beka biology book as the primary text would be inappropriate in a college preparatory course. Ayala testified that the texts "reject the methodology generally accepted in science, which relies on observation and experimentation and on the formulation of laws and theories that need to be tested rather than accepted on the basis of the Bible or any other authority." App. 105a-106a. Kennedy testified that, "[b]y teaching students to reject scientific evidence and methodology whenever they might be inconsistent with the Bible . . . both texts fail to encourage critical thinking and the skills required for careful scientific analysis." App. 105a. Both Ayala and Kennedy testified that the books fail adequately to teach evolution, which "is the central organizing principle that biologists use to understand the living world" and "is critical to understanding biology as a whole." SER 955, 1185. As the district court recognized, these opinions were uncontroverted by Petitioners' biology expert, Michael Behe, who opined only that the BJU biology text "mention[ed]" various topics, but not "how much detail or depth" the text contained. App. 39a. As the district court also noted, some ACSI schools "have

declined to use BJU and A Beka textbooks because of concerns about the texts' academic merit." App. 37a n.15.

Because Petitioners do not discuss biology courses in their Petition, it is unclear whether they still contend that courses relying on these texts should have been approved.

B. History

Petitioner Calvary's disputed history course uses a primary text from BJU. UC history Professor and BOARS member James Given and UC's expert, UC Professor Gary Nash, agreed that the BJU history text fails to teach critical thinking or modern historical analytic methods adequately because it: (1) instructs that the Bible is the unerring source for analysis of historical events; (2) attributes events to divine providence rather than human action; (3) evaluates historical figures and their contributions based on their religious motivations; and (4) contains inadequate treatment of several major ethnic groups, women, and non-Christian religious groups. App. 107a-108a. These professors concluded that courses relying primarily on the BJU text would not adequately prepare students. *Id.*[9]

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[9] The a-g disciplines are defined not only by their substantive material, but also by their methodologies and the types of evidence they accept. Science explores natural causes based on material evidence; the discipline does not include supernatural or religious explanations. SER 967, 1183. History and other academic disciplines are similar. SER 343, 431-33, 457. If supernatural or religious explanations are used as overriding explanations or frameworks for analysis, they may interfere with teaching the subject in a manner that prepares students for UC. It is for this reason that UC's Admissions Director testified that a course taught *solely* from such a perspective—a

As the district court held, the conclusions of Professors Given and Nash were uncontroverted. Professor Vitz, a psychology professor that Petitioners offered as their history and government expert, merely compared the *indices* at the backs of the BJU history and government texts to *indices* at the backs of other texts in an irrelevant attempt to show "bias" in all texts. ER 1118-33. Vitz's report offered no opinion whether the Calvary history course or its textbook teaches the methods of historical analysis and critical thinking skills expected by UC. App. 33a.

Petitioners now also reference a history course titled "History of Christianity," from a Catholic (non-ACSI) school. Petition at 8. As the Petition itself makes clear, the reason UC gave for denying that course approval was: "We would expect a course in the History of Christianity to include *more than one Christian viewpoint*." *Id.* (emphasis added). The issue was not that the course included a religious viewpoint but that it did not include enough Christian viewpoints to satisfy UC's educational standards. Petitioners did not enter the syllabus for that course into the record, so Petitioners could have no basis to claim that, contrary to UC's assessment at the time, the course would have taught the content and critical thinking skills expected for preparing students for UC.

Despite Petitioners' unsupported assertions otherwise, the evidence demonstrates that UC *does* approve history courses that include a religious

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perspective expressly defined by Petitioners' counsel as "a claim that [the Christian perspective] is the *correct* position"—would probably not be approved. SER 300-01, 3692-93. Petitioners repeatedly misuse this testimony. *See, e.g.*, Petition at 12 & n.5.

perspective on the material. App. 55a (citing the approved history course "Western Civilization: The Jewish Experience"); *see also* SER 79 (course reviewer testimony that presence of religious content does not cause history courses to be disapproved); SER 90 (same).

C. English

Petitioner Calvary's contested English course used a Beka anthology as its primary text. App. 29a-30a. UC does not approve courses for "b" credit if they primarily use an anthology; college-preparatory courses are expected to require reading full novels or plays. *Id.* As the district court recognized, Petitioners' English expert, Dr. Stotsky, found this requirement to be reasonable. *Id.*

In addition, both UC's course reviewers and UC's expert, UC Professor Samuel Otter, concluded that Petitioner Calvary's course and its text were inconsistent with UC's expectations for teaching critical thinking skills and exposing students to writers' key works. *Id.* They agreed that the Beka anthology is inadequate not because it offers a Christian perspective but because it "fails to provide substantial readings and because it insists on specific interpretations." App. 30a.

As the district court recognized, this is again uncontroverted. Petitioners' expert limited her opinion to the irrelevant issue of whether vaguely defined "viewpoints" appear in various texts. App. 31a. She did not opine whether the Beka text is adequate for a college-preparatory course. *Id.* Stotsky did note, however, that "almost the same list of authors" appears on both Calvary's syllabus and those of three approved courses at other Christian

schools (where full-length works, rather than short excerpts of works, of these authors are read) a fact that, if relevant at all, shows UC's decisions were *not* based on religion. SER 74.

Petitioners now mention two additional "English" courses—"Grammar and Composition" and "Introduction to the New Testament." Petition at 9. Petitioners did not raise either of these in their Ninth Circuit briefing. Indeed, the only document included in the record materials Petitioners presented to the Ninth Circuit about either course—UC's evaluation form for "Introduction to the New Testament," from a Catholic (non-ACSI) school—shows that the course was submitted as an elective, not as an English course, and that it was rejected because it lacked prerequisites. ER 2264.[10]

D. Religion

For most of the disputed religion courses, disapproval was based upon UC's long-standing Policy on Religion and Ethics Courses,[11] which provides that approved religion courses should "treat the study of religion or ethics from the standpoint of scholarly inquiry rather than in a manner limited to one denomination or viewpoint" and should not have as a primary goal promoting the students' "personal

[10] Even if, among the many *thousands* of course decisions produced in this litigation, Petitioners could identify a few decisions that were arguably mistaken, mistakes are not constitutional violations. *See Bishop v. Wood*, 426 U.S. 341, 349-50 (1976) ("[N]umerous individual mistakes are inevitable in the day-to-day administration of our affairs. The . . . Constitution cannot feasibly be construed to require federal judicial review for every such error.")

[11] Religion and ethics courses typically fall into the "g" elective category.

religious growth." App. 72a. UC's expert, Professor Robert Sharf, explained that this reflects the scholarly approach in religious studies, for which these courses are expected to prepare students. *Id.* "One of the methodological foundations of the [discipline of religious studies] is the ability to step back and gain intellectual and emotional distance from the subject matter." *Id.* Professor Sharf contrasted the discipline of religious studies at UC, which is neutral among religions, with the study of theology at seminaries and religious colleges, which may promote particular religious beliefs. ER 2214. Because "scholarly detachment is requisite for . . . unbiased analysis into the nature of religious phenomena," UC properly disapproves courses that would not impart the basic conceptual skills required for college-level work in religious studies. App. 72a.

As the district court held, Professor Sharf's opinions are uncontroverted. App. 73a. Petitioners' purported religion expert, Daniel Guevara, is a professor of philosophy, not religion, and testified that a religion professor would have more expertise in the latter discipline. SER 913. He testified that the opinions in his expert report were solely about whether "UC's policies are ethical or moral" (SER 914-17), while admitting that he is not "in a better position to say what in particular is more ethical [or moral]" than anyone else (SER 914-16).

The one specific religion course Petitioners focus on now—"Jewish Philosophy," from a Jewish (non-ACSI) school (Petition at 7)—was disapproved pursuant to

the longstanding and reasonable Policy on Religion and Ethics Courses.[12]

III. THIS LAWSUIT AND THE LOWER COURT DECISIONS

A. Complaint

Petitioners are the Association of Christian Schools International ("ACSI"); Calvary, an ACSI member school; and various Calvary students. Petitioners' Complaint challenged UC's course review policy on its face, including UC's denying science credit for biology courses using the BJU or Beka books as primary texts and the Policy on Religion and Ethics Courses. ER 1316-1322. The Complaint also included as-applied challenges to UC's denial of a-g approval for three courses submitted by Calvary—in American history, English, and government. ER 1367-1401. The Complaint did not mention specific course submissions from any other ACSI or non-ACSI school, and no non-ACSI school or organization joined in the Complaint. Petitioners sought only declaratory and injunctive relief.

B. Summary Judgment Rulings

After discovery, Petitioners moved for summary judgment. UC simultaneously moved for partial summary judgment on Petitioners' facial challenges.

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[12] The Women's Studies elective also discussed in the Petition (Petition at 7) was disapproved in part because the syllabus was missing information about "Unit 3"—it skipped "from Unit 2B directly to Unit four." ER 2368. UC invited the school to submit the missing information so it could "adequately evaluate the course." *Id.* Petitioners have never offered any evidence that this response was unreasonable or that the Women's Studies course taught content and skills that would prepare students for UC.

In March 2008, the district court denied Petitioners' motion and granted UC's. App. 42a-158a.

The district court found that the evidence established that UC does not have a policy of rejecting courses that contain standard content but add a religious viewpoint. App. 55a, 57a, 59a. The court further found that UC's course-review policy is constitutional if it is reasonably related to the goal of providing a public service that by its nature requires evaluations of, and distinctions based upon, the content of speech and is not the product of government animus. App. 63a-64a. The court found that, because the uncontroverted expert testimony demonstrated that UC's a-g guidelines, the Policy on Religion and Ethics Courses, and the Position Statement rejecting biology courses that rely primarily on the BJU and Beka textbooks were all academically reasonable, those policies are constitutional on their face. App. 71a-74a. The district court further held that it is reasonable for UC to limit its course review to courses from California high schools because "[g]raduates of California high schools make up more than ninety percent of UC applicants." App. 78a.[13]

The parties then jointly requested permission for UC to move for summary judgment on Petitioners' as-applied challenges. The court granted that request and ordered Petitioners to identify "the specific . . . courses they wish to include in their as-applied challenges." ER 1178. Petitioners initially listed 41 courses but later withdrew three. App. 14a n.2. All but 4 of the courses were from schools other than Petitioner Calvary. ER 1173-77.

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[13] In addition, out-of-state students are never guaranteed admission to UC based on coursework.

In opposition to UC's motion, Petitioners proffered previously undisclosed expert opinions regarding the 38 remaining courses. The district court ruled that Petitioners had waived any as-applied challenges to courses other than Calvary's courses identified in the Complaint and one biology course identified in an interrogatory response. App. 22a-23a; ER 1175. The court also excluded Petitioners' belated expert opinions because those opinions had not been disclosed during discovery. App. 23a-25a. The court found that, in any event, ACSI lacked associational standing to pursue as-applied challenges to individual course decisions because the relief sought—"an order that [UC] must reconsider (or perhaps approve) specific proposed courses"—"inhibits any resolution in a group context" and because the as-applied claims would "require an ad hoc factual inquiry" for each school at issue. App. 19a-20a (internal quotation marks omitted). Finally, the court found that the as-applied challenges to UC's rejections of the Calvary courses were meritless, because the uncontroverted evidence demonstrated that UC had reasonable academic bases for those decisions. App. 29a-36a.

C. Ninth Circuit Ruling

The Ninth Circuit affirmed. The court found that heightened First Amendment scrutiny is not appropriate "where, as here, the government provides a public service that, by its nature, requires evaluations of and distinctions based on the content of speech." App. 2a. The Ninth Circuit emphasized that it is "undisputed that UC's policy does not prohibit or otherwise prevent high schools . . . from teaching whatever and however they choose or students from taking any course they wish." App. 3a. The court held that Petitioners' facial challenges

failed because the uncontroverted evidence shows that UC does not have a policy or practice of rejecting courses with standard content because they add a religious viewpoint. App. 4a. The court further held that Petitioners' "list of 150 rejected courses, without any supporting analysis, does not raise a genuine issue of material fact with respect to whether UC's policy . . . [violates] the overbreadth doctrine." App. 10a.

On the as-applied challenges, the Ninth Circuit agreed that ACSI lacks associational standing to "assert as-applied claims on behalf of its member schools that are not parties to this lawsuit." App. 5a. The court noted that "because [it] conclude[d] that ACSI lacks associational standing, [it] need not address the . . . decision that [Petitioners] waived as-applied challenges for non-Calvary courses that were not timely disclosed." App. 5a n.2. The Ninth Circuit also held that Petitioners had waived any challenge to the exclusion of their undisclosed expert evidence. App. 10a. Finally, the court held that UC's rejections of Calvary's courses were reasonable: "UC denied approval not because the courses added a religious viewpoint, but because they were either not college preparatory, lacked necessary course information or materials, or had other procedural defects which Calvary never bothered to cure." App. 6a.

SUMMARY OF THE ARGUMENT

This fact-bound case does not warrant review. Petitioners' claims are all premised on the allegation that UC denies a-g approval to courses that "teach standard content if they add a religious viewpoint." As the courts below both held, the uncontroverted evidence shows that allegation to be false. App. 4a, 55a-59a.

Petitioners also mischaracterize the Ninth Circuit's ruling in their attempt to show a conflict with the decisions of this Court and other Circuits. Petitioners repeatedly assert that the Ninth Circuit held broadly that rational basis scrutiny, not strict scrutiny, applies whenever "'government provides a public service.'" Petition at ii; *see also, e.g., id.* at 1, 24, 27, 29. But the Ninth Circuit held only that heightened scrutiny does not apply "where, as here, the government provides a public service *that, by its nature, requires evaluations of and distinctions based on the content of speech.*" App. 2a (emphasis added). That is entirely consistent with this Court's decisions. *See United States v. Am. Library Ass'n, Inc.*, 539 U.S. 194, 204-05 (2003) ("*ALA*"); *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 580 (1998); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271-72 (1988); *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 673 (1998). Petitioners also assert that "[o]ther circuits conflict with the Ninth Circuit's refusal to find viewpoint discrimination *in UC's rejection of courses because of added religious viewpoints.*" Petition at 21 (emphasis added). But, again, the Ninth Circuit found that UC does *not* reject courses because of added religious viewpoints. App. 4a, 55a.

Finally, Petitioners argue that the Ninth Circuit's holding that Petitioner ACSI lacks associational standing to bring as-applied challenges to UC's individual course decisions is in conflict with decisions of other Circuits. Petition at 36. But none of the cited decisions involved an association's standing to assert as-applied claims where, as here, liability on each claim would depend upon the specific facts with respect to each member *and* any declaratory or injunctive relief for each claim would need to address

the specific circumstances of each member in order to provide meaningful relief. Even if there were some conflict between the Circuits—which there is not—this case would not be an appropriate vehicle for resolving it, because the courts below held that Petitioners waived the as-applied challenges that would have required associational standing. App. 6a, 21a-23a. The district court also excluded as untimely the only expert opinions that would purportedly have supported those as-applied challenges (App. 23a-25a), and the Ninth Circuit affirmed that evidentiary ruling. App. 10a-11a.

The Petition for a Writ of Certiorari should therefore be denied.

REASONS FOR DENYING THE WRIT

I. THE ENTIRE PETITION IS BASED ON THE FALSE PREMISE THAT UC REJECTS COURSES REGARDLESS OF WHETHER THEY ADEQUATELY TEACH CONTENT AND SKILLS, IF THEY ADD A RELIGIOUS VIEWPOINT

Petitioners' entire petition is based on the false premise that UC "reject[s] private schools' courses that adequately teach standard content if they add a religious viewpoint." Petition at 1; *see also, e.g., id.* at *i* ("question presented is: Whether the Ninth Circuit erred in [upholding UC's] rejection of courses in religious high schools . . . when they add to standard content a religious viewpoint . . . ."); 5 ("UC began to reject courses that contain adequate standard content but add a religious viewpoint"); .6 (policy or practice to reject "courses with standard content because they added a religious viewpoint"); 13 ("[T]he case involves UC's viewpoint discrimination against courses . . .

which teach standard content, *because* they add a religious viewpoint."). Both the Ninth Circuit and the district court found, consistent with uncontroverted evidence described above, that UC does no such thing.

The Ninth Circuit squarely held: "[T]he Plaintiffs contend that UC has a well established practice of rejecting courses with standard content solely because they add a religious viewpoint. . . . *The evidence, however, is to the contrary*. It is undisputed that UC has approved courses with religious content and viewpoints as well as courses that used religious textbooks as the primary and secondary course texts." App. 4a.

Similarly, the district court held: "Plaintiffs contend that Defendants have a policy of rejecting courses that contain standard content, but add a single religious viewpoint. . . . *Yet, the evidence establishes otherwise.*" App. 55a; *see also, e.g.*, App. 56a ("Defendants are not withholding approval solely because the course includes a religious viewpoint."); App. 57a ("The evidence establishes that Defendants do not have a policy of rejecting courses solely because the courses add a religious viewpoint. Plaintiffs provide no evidence of such a policy.").

The sole "question presented" in the Petition—"[w]hether the Ninth Circuit erred in holding constitutional . . . [UC's] rejection of courses . . . when they add to standard content a religious viewpoint"—therefore does not arise from the decision of either the Ninth Circuit or the district court. The Petition should be denied on that basis alone.

II. THE NINTH CIRCUIT'S DECISION ON THE MERITS IS CONSISTENT WITH BOTH THIS COURT'S DECISIONS AND THOSE OF OTHER CIRCUITS

A. The Ninth Circuit's Rejection of Strict Scrutiny Is Consistent with This Court's Decisions

Petitioners mischaracterize the Ninth Circuit's holding regarding the level of First Amendment scrutiny that applies to UC's policies and decisions. Petitioners repeatedly assert that the Ninth Circuit held broadly that rational basis scrutiny, not strict scrutiny, applies whenever "'government provides a public service'." Petition at ii; *see also*, *e.g.*, *id.* at 1, 24, 27, 29. But that was not the holding of either court below. The Ninth Circuit held only that heightened scrutiny does not apply "where, as here, the government provides a public service *that, by its nature, requires evaluations of and distinctions based on the content of speech*." App. 2a (emphasis added). In almost identical language, the district court held only that heightened scrutiny does not apply "where the government is providing a public service *that by its nature requires evaluations of, and distinctions based upon, the content of speech*." App. 63a-64a (emphasis added).

These narrow rulings are supported by this Court's decisions, which have repeatedly rejected heightened First Amendment scrutiny—including any blanket prohibition of "viewpoint" or "content-based" regulation—where the government provides a public service that by its nature requires evaluations and distinctions based on the content of speech. This Court has made clear that such evaluations and distinctions are constitutional if they are reasonably related to the

goal of providing the service in question and therefore do not constitute "invidious" viewpoint discrimination. *See ALA*, 539 U.S. at 204-05; *Finley*, 524 U.S. at 580-81; *Hazelwood*, 484 U.S. at 271-72; *Forbes*, 523 U.S. at 673.

In each instance, this Court rejected invalidation of government decisions based on the labels "viewpoint discrimination" or "content regulation." In *ALA*, this Court reversed a decision that the Children's Internet Protection Act (CIPA), which required libraries to block "obscenity" and "child pornography" in order to obtain federal assistance, was an impermissible "content-based restriction." 539 U.S. at 199, 202-03. The Court held that "forum analysis [such as it had applied in *Rosenberger v. Rector & Visitors of University of Virginia*, 515 U.S. 819, 829-31 (1995)] and heightened judicial scrutiny . . . are . . . incompatible with the discretion that public libraries must have to fulfill their traditional missions." *Id.* at 205. This Court upheld CIPA because the avowedly "content-based" judgments that libraries would be required to make were "reasonable." *Id.* at 208.

In *Finley*, this Court reversed the court of appeals' invalidation as a "viewpoint-based restriction[]" of a requirement that the NEA ensure that "artistic excellence and artistic merit are the criteria by which [grant] applications are judged, taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public." 524 U.S. at 572-73, 579-80. Even though as "a consequence of the nature of arts funding," decisions regarding such funding are "content" and "viewpoint" based, this Court declined to apply heightened scrutiny and held that its decisions in *Rosenberger* and *Lamb's Chapel v. Center Moriches*

Union Free School District, 508 U.S. 384, 387 (1993)—upon which Petitioners here principally rely—were inapplicable. *Id.* at 585-86. The Court "expressly declined to apply forum analysis, reasoning that it would conflict with 'NEA's mandate . . . to make esthetic judgments, and the inherently content-based 'excellence' threshold for NEA support.'" *See ALA*, 539 U.S. at 205 (quoting *Finley*, 524 U.S. at 586). The Court indicated that only "*invidious* viewpoint discrimination"—decisions based on viewpoint that penalize "disfavored viewpoints" rather than reasonably furthering the NEA's mission—would violate the First Amendment. *Finley*, 524 U.S. at 587.

Likewise, in *Hazelwood*, this Court found a principal's deletion of school newspaper articles was not impermissible content or viewpoint regulation. 484 U.S. at 265-66. Because it is necessary for educators to make content- and viewpoint-based judgments about speech, *id.* at 271-72, the Court declined to apply heightened scrutiny or its public forum decisions. *Id.* at 267-72. Instead, the Court held that the First Amendment was not offended "so long as [the educators' decisions] are reasonably related to legitimate pedagogical concerns." *Id.* at 273. Similarly, in *Forbes*, the Court recognized that "[p]ublic . . . broadcasters . . . are not only permitted, but indeed required, to exercise substantial editorial discretion in the selection and presentation of their programming" and so "must often choose among speakers expressing different viewpoints." 523 U.S. at 673.

Petitioners' burden under these decisions is particularly heavy because UC promulgated the a-g guidelines as part of its First Amendment "freedom . . . to

make its own judgments [about] . . . the selection of its student body." *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 312 (1978) (Powell, J. concurring); *see also Grutter v. Bollinger*, 539 U.S. 306, 329 (2003) (same). As Justice Frankfurter said in *Sweezy v. New Hampshire*, "the four essential freedoms of a university" include the freedoms "to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study." 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring); *see also Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 226 n.12 (1985) ("Discretion to determine, on academic grounds, who may be admitted to study, has been described as one of 'the four essential freedoms' of a university.").

For educators to make academic judgments that their educational missions require and the First Amendment protects, they must have the discretion to evaluate the means, content, and viewpoints of academic expression. This Court has recognized that this discretion includes "a public school prescribing its curriculum," despite the fact that this necessarily "will facilitate the expression of some viewpoints instead of others." *Forbes,* 523 U.S. at 674. For example, educators cannot grade academic work without evaluating the soundness of students' ideas. *See, e.g., Settle v. Dickson County Sch. Bd.*, 53 F.3d 152, 155 (6th Cir. 1995) ("[T]eachers, like judges, must daily decide which arguments are relevant, which computations are correct, which analogies are good or bad."). Although such evaluations are based on the content of speech, that does not trigger heightened scrutiny. This Court has repeatedly rejected judicial micro-management of academic decisions. *See, e.g., Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez*, ___ U.S.

___, Slip Op. at 20 (June 28, 2010) ("[W]e have cautioned courts in various contexts to resist substituting their own notions of sound educational policy for those of the school authorities.") (internal quotation marks omitted); *Ewing*, 474 U.S. at 225 ("[J]udges . . . asked to review the substance of a genuinely academic decision . . . should show great respect for the faculty's professional judgment.").

Here, to fulfill its mandate as an elite university, UC must make admissions judgments. This necessarily includes judgments about speech—including whether particular high school courses will adequately prepare students. These judgments must be upheld if they are reasonably related to UC's educational mission.

Petitioners' argument for "strict scrutiny" is based on the simplistic use of the label "viewpoint discrimination." *See, e.g.*, Petition at ii, 1, 15-32. But this Court's decisions on which Petitioners rely are inapposite. They involved either (1) exclusion of speech from government property that is used as a forum for speech,[14] (2) mandatory fees to support others'

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[14] *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106-09 (2001) (exclusion of religious club from "limited public forum"); *Rosenberger*, 515 U.S. at 829-31 (exclusion of religious publications from "limited public forum"); *Widmar v. Vincent*, 454 U.S. 263, 267 (1981) (exclusion of religious worship and discussion from "[university] forum generally open for use by student groups"); *Lamb's Chapel*, 508 U.S. at 387 (denial of permission to show religious films on public school property); *Forsyth County, Ga. v. Nationalist Movement*, 505 U.S. 123, 130 (1992) (ordinance requiring permit and fee to speak in "traditional public forum"); *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 790-91 (1985) (exclusion of advocacy organizations from charitable fundraising drive in federal workplace); *Perry Educ. Ass'n v. Perry Local Educators'*

speech;[15] (3) outright prohibitions on certain speech,[16] (4) compelled speech,[17] or (5) compulsory acceptance of members into a private organization.[18] This case involves none of those circumstances. Petitioners' cases are, simply, inapplicable. It is irrelevant that, as Petitioners note (Petition at 27), some of those cases also happened to involve state universities.

Ass'n, 460 U.S. 37, 44 (1983) (exclusion of some unions from using public school mailboxes); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 504 (1969) (ban on black armbands in public school).

Because the claim in *Healy v. James*, 408 U.S. 169 (1972), was freedom of association rather than speech, the Court did not explicitly apply forum analysis. But the facts in *Healy* are analogous to those in *Good News Club*, because the college there refused recognition and meeting space to one student political group while granting it to others.

[15] *Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 220-21 (2000) (mandatory student fee to support organizations engaging in political or ideological speech held closely analogous to public forum).

[16] *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 391 (1992) (ban on "'fighting words' that insult, or provoke violence, 'on the basis of race, color, creed, religion or gender'"); *Police Dep't of Chi. v. Mosley*, 408 U.S. 92, 92-93 (1972) (ban on all picketing other than peaceful labor picketing); *Regan v. Time, Inc.*, 468 U.S. 641, 644-46 (1984) (ban on certain photographic reproductions of currency).

[17] *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 559, 581 (1995) (requirement that parade include a group imparting a message the organizers do not wish to convey); *see also Christian Legal Society v. Martinez*, ___ U.S. ___, Slip Op. at 16 n.14 ("*Hurley* involved the application of a statewide public-accommodations law to the most traditional of public forums: the street.").

[18] *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 650 (2000) (attempt to compel organization to accept members who would impair group's expression).

Petitioners argue that the Ninth Circuit's reliance on *Finley*, *ALA*, and *Forbes* was misplaced because "those decisions prohibit viewpoint discrimination." Petition at 29. While those decisions undoubtedly prohibit "*invidious* viewpoint discrimination"—discrimination that is intended to penalize "disfavored viewpoints" *rather than* reasonably furthering the government's speech-related mission, *see Finley*, 524 U.S. at 587[19]—the decisions also make clear that, when the government's mission by its nature requires evaluations of speech, it *may* make viewpoint distinctions that *are* reasonably in furtherance of that mission. Thus, in *ALA*, the Court emphasized that "[p]ublic library staffs necessarily consider content in making collection decisions and enjoy broad discretion in making them" and that, because libraries need to select the materials they offer to the public, the library context is different from those in which all viewpoint-based distinctions are impermissible. 539 U.S. at 205, 206 & n.7. In *Hazelwood*, the Court explained that a school "retain[s] the authority" to restrict student speech expressing certain viewpoints, including "speech . . . advocat[ing] drug or alcohol use." 484 U.S. at 272. In *Finley*, the Court *upheld* the NEA's discretion to make decisions based on "general standards of decency," which would necessarily involve some viewpoint-based distinctions. 524 U.S. at 572-73. In *Forbes*, the Court held that "the nature of editorial discretion counsels against subjecting broadcasters to claims of viewpoint

[19] Thus, for example, UC could not, based simply on hostility to the viewpoint rather than reasonable educational objectives, approve courses that advocate a Christian or Democratic perspective while disapproving courses that advocate a Jewish or Republican perspective. There is no evidence of such disparate treatment here.

discrimination" and "broadcasters must often choose among speakers expressing different viewpoints." 523 U.S. at 673.

Petitioners assert that *Finley*, *ALA*, and *Forbes* are "limited to government selection among speech to subsidize, and do not involve government regulation of private speech." Petition at 29; *see also id.* at 30-31. But UC does not engage in "*regulation* of private speech" any more than did the NEA in *Finley*. This case involves UC's internal standards for granting the benefit of university admission to high school students, while *Finley* involved the NEA's internal standards for granting the benefit of arts funding to private speech by artists. Here, private schools may teach (and students may take) any courses in any manner they choose, just as, in *Finley*, artists remained free to create whatever art they chose. The a-g guidelines apply only to courses for which schools *choose to request approval* so that their students *who choose to apply to UC* may use those courses to gain the benefit of UC eligibility—just as the NEA's standards applied only to art for which artists chose to request government funding. *Finley*, 524 U.S. at 573-577. In terms of Petitioners' dichotomy, UC's course review for purposes of its own internal admissions decisions—without any restriction on what courses schools may teach or students my take—is much more like a "subsid[y]" than it is like a "regulation of private speech."[20]

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[20] Contrary to Petitioners assertions (Petition at 32-35), the Ninth Circuit's analyses of Petitioners' free exercise, Establishment Clause, and equal protection claims were entirely consistent with this Court's prior opinions. In any event, each of those claims is premised on the notion that UC rejects courses "because of an added religious viewpoint" (*id.* at

B. The Ninth Circuit's Decision Does not Create a Circuit Split

Petitioners argue that "[o]ther circuits conflict with the Ninth Circuit's refusal to find viewpoint discrimination *in UC's rejection of courses because of added religious viewpoints*." Petition at 21 (emphasis added). But, again, the courts below found that UC does *not* reject courses because of added religious viewpoints. App. 4a, 55a.

The Ninth Circuit's decision does not remotely conflict with any of the other Circuit decisions discussed by Petitioners. Petition at 21-22, 28-29. In *DeBoer v. Village of Oak Park*, 267 F.3d 558 (7th Cir. 2001), *Mesa v. White*, 197 F.3d 1041 (10th Cir. 1999), and *Child Evangelism Fellowship of South Carolina v. Anderson School District Five*, 470 F.3d 1062 (4th Cir. 2006), the courts of appeals addressed viewpoint- and content-based discrimination only in the context of public forums. *DeBoer*, 267 F.3d at 566-567 (village hall); *Mesa*, 197 F.3d at 1044 (county commission meeting); *Child Evangelism Fellowship*, 470 F.3d at 1064, 1069 (public school facilities). Here, there is no public forum, and there is therefore no inconsistency between the Ninth Circuit's decision and these public forum cases.

In *Wigg v. Sioux Falls School District 49-5*, 382 F.3d 807 (8th Cir. 2004), the Eighth Circuit addressed only the defendant school district's argument that its decision prohibiting a teacher from participating in a Christian-based after-school program at district schools was justified by its desire to avoid a claim that it had violated the

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33), and so each necessarily fails due to the lack of evidence to support that premise.

Establishment Clause. *Id.* at 812-816. No similar issue exists here.

In *Roach v. Stouffer*, 560 F.3d 860 (8th Cir. 2009), the Eighth Circuit held that messages on license plates are private speech and that the absence of any guidelines in Missouri's process for approving such messages rendered the approval process unconstitutional. *Id.* There was no suggestion that the issuance of specialty personal license plates is a government function that, like education, *requires* that the government make content- or viewpoint-based decisions.

Finally, in *Christian Legal Society v. Walker*, 453 F.3d 853 (7th Cir. 2006), the Seventh Circuit held it unconstitutional for Southern Illinois University's School of Law to revoke the official student organization status of the Christian Legal Society because it denied membership to those who engage in or affirm homosexual conduct. *Id.* at 857. The continued vitality of this decision is highly doubtful in light of this Court's recent contrary decision in *Christian Legal Society v. Martinez*, *supra*, Slip Op. at 31. In any event, no similar issue exists here.

In short, the Ninth Circuit's decision does not create any split of authority with these other Circuit decisions.

III. THIS CASE DOES NOT PRESENT ANY ISSUE OF ASSOCIATIONAL STANDING ON WHICH THERE IS A CIRCUIT SPLIT, AND, IN ANY EVENT, PETITIONERS WAIVED THE AS-APPLIED CHALLENGES THAT IMPLICATE ASSOCIATIONAL STANDING

Petitioner ACSI's associational standing to state a facial challenge to UC's a-g guidelines has never been

questioned. The issue of associational standing arose only after UC was granted summary judgment on ACSI's facial challenges and ACSI for the first time attempted to assert as-applied challenges concerning courses from non-plaintiff ACSI-member schools. UC argued that ACSI had waived any such as-applied challenges by not raising them previously, and, in any event, ACSI lacked associational standing both because resolution of those challenges would require the participation of each individual school whose course submissions were being implicated and because any relief obtained would be different for each school and course and would not apply to all ACSI members. The district court and the Ninth Circuit agreed. App. 5a, 18a-21a.

Petitioners now assert that the Ninth Circuit's rejection of associational standing for ACSI on the as-applied challenges to UC's individual course decisions conflicts with decisions of the First, Third, and Seventh Circuits. Petition at 36. None of those decisions, however, involved an association's standing to assert as-applied claims where, as here, liability on each claim would depend upon the specific facts with respect to each member *and* any declaratory or injunctive relief on each claim would need to address the specific circumstances of each member in order to provide meaningful relief. *See Hosp. Council of W. Pa. v. City of Pittsburgh*, 949 F.2d 83 (3d Cir. 1991) (challenge to alleged governmental threats against tax-exempt hospitals to coerce payments in lieu of taxes); *Retired Chi. Police Ass'n v. City of Chicago*, 7 F.3d 584 (7th Cir. 1993) (challenge to settlement agreement between City of Chicago and pension funds); *Playboy Enters., Inc. v. Pub. Serv. Comm'n of P.R.*, 906 F.2d 25 (1st Cir. 1990) (challenge to local obscenity statute and prosecutions thereunder based

on First Amendment and Cable Communications Policy Act).

In *Warth v. Seldin*, 422 U.S. 490 (1975), this Court held that, "so long as the nature of the claim and of the relief sought does not make the individual participation of each injured party indispensable to proper resolution of the cause," an association may be an appropriate representative of its members. *Id.* at 511. The Court further emphasized that, "in all cases in which we have expressly recognized standing in associations to represent their members, the relief sought" would "inure to the benefit of those members of the association actually injured." *Id.* at 515. In *Hospital Council* and *Retired Chicago Police Ass'n*, the Third and Seventh Circuits upheld associational standing because, given the nature of the claims and the relief sought, while some association members might need to participate, the participation of each allegedly injured member was not necessary. *Hosp. Council*, 949 F.2d at 89-90; *Retired Chi. Police Ass'n*, 7 F.3d at 601-603. In *Playboy Enterprises*, the First Circuit upheld associational standing because "[the requested] declaratory relief turns on a question of law which is not particular to each member," "the declaration applies equally to all members," and "no individual findings are necessary." 906 F.2d at 35.

Here, by contrast, determining both liability and the appropriate remedy on Petitioners' as-applied claims would require individualized proof from and findings with respect to each allegedly injured school, and any equitable relief would necessarily be specific to each school and course. First, ACSI's as-applied free speech and equal protection claims would require individualized evaluation of UC's disapproval of each course. Second, ACSI's as-applied claims would

require individualized proof to determine whether UC's actions substantially burdened each school's ability to practice its religion. *See Harris v. McRae*, 448 U.S. 297, 320-321 (1980) (free exercise claim requires showing substantial burden on particular petitioner so it "ordinarily requires individual participation"). Third, the equitable relief ACSI seeks would require individualized proof specific to each school and each course, including the course details, the reasons for UC's decision, and whether the school still offers or intends to offer the course. Moreover, relief on any particular course would benefit only a single school. This sharply contrasts with the cases relied upon by Petitioners where individualized findings were not necessary and the plaintiff organizations sought generalized equitable relief that would benefit all members equally.

Even if there were any Circuit conflict—which there is not—this case would be an inappropriate vehicle for resolving it. The Ninth Circuit held, in the alternative, that Petitioners had waived any appeal from summary judgment on their as-applied challenges because, "[i]nstead of identifying the factual issues and asserting arguments as to why they were material, the Plaintiffs merely provide[d] a table of citations to various declarations, affidavits, exhibits, and depositions relating to each rejected course, leaving [the Ninth Circuit] to 'piece together' their argument." App. 6a. Moreover, although the Ninth Circuit did not reach the issue (App. 5a n.2), the district held that Petitioners waived their as-applied challenges with respect to non-Calvary courses because Petitioners had not timely disclosed those challenges. App. 21a-23a. The district court also excluded as untimely the only expert opinions arguably relevant to the as-applied challenges (App.

23a-25a), and the Ninth Circuit affirmed that evidentiary ruling (App. 10a-11a). The Petition does not challenge any of these procedural or evidentiary rulings. Thus, Petitioners' non-Calvary as-applied claims are barred and unsupported regardless of whether ACSI would have associational standing.

CONCLUSION

The Petition for Certiorari should be denied.

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IN THE

Supreme Court of the United States

ASSOCIATION OF CHRISTIAN SCHOOLS INTERNATIONAL, *et al.*,

Petitioners,

v.

ROMAN STEARNS, in His Official Capacity as Special Assistant to the President of University of California, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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COURSES, THE 150 COURSE REJECTIONS, AND UC'S DESCRIPTIONS WERE NOT A VIEWPOINT DISCRIMINATORY POLICY OF REJECTING COURSES WITH STANDARD CONTENT THAT ADD A RELIGIOUS VIEWPOINT. IT CONFLICTS WITH THE SEVENTH, EIGHT, TENTH, AND FOURTH CIRCUITS THAT FIND SIMILAR ACTIONS TO BE VIEWPOINT DISCRIMINATORY 8

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REPLY TO STATEMENT OF THE CASE

I. UC Cannot and Does Not Deny that Its Vice President in Charge, Its Policy on Religion and Ethics Courses, Its Stated Reason for Rejecting 150 Courses, and Its Pleadings Say It Disapproved Courses With Standard Content that Add a Religious Viewpoint. Instead, UC Tries To Obscure Its Viewpoint Discrimination by the Rational Basis Test and by False Claims that UC's Policies Are "Academically Reasonable" and Do Not "Substantially Burden Petitioners."

The relevant evidence is undisputed about UC rejecting courses with standard content if they add a religious viewpoint; consequently UC studiously ignores it and hopes this Court will too. That undisputed evidence of viewpoint discrimination falls in four categories: (a) sworn statements of UC's officer in charge of course review, (b) UC's "Policy on Religion and Ethics Courses," (c) "more than 150 courses rejected by UC" for added religious perspectives (to use the district court's enumeration, App.103a),[1] and

[1] Contrary to UC's n.7, the rejected "150 courses" quotes the district court's and Ninth Circuit's (App.103a, 9a-10a) enumeration of courses identified in the first compilation (ER750-77). Most were also in the second compilation (ER443-86). The relevant question was whether they were rejected for added religious viewpoints, in whole or part, which was proved by the compilations and expert witness declarations (ER498-504, 524-28, 672-88, 957-58, 233-56, 285-99, 323-56, 360-85). It was not ACSI's burden to prove the 150 courses should have been approved, but that analysis *was* provided. (*Id.*) The compilations were admissible under Fed.R.Evid.1006, and the lower courts did not exclude them or accept UC's inadmissibility argument. The second compilation quoted *all* UC's stated grounds for rejection (ER443-86). Both cited only exhibits filed with the district court (some at ER1981-2454; all at docket nos.72-74, 219-

(d) UC's own descriptions of its policy. Each is a UC admission of a policy or practice of viewpoint discrimination:

(a) UC's Vice President Susan Wilbur testified that a course will be rejected if it "provides all standard material on the subject" and, "in addition, provides a Christian perspective" as the only added viewpoint. (ER969.) She applied that principle to government (*id.*), English (ER967-68), science (ER1528), and other courses. She also declared a policy, complete with form rejection letter, that history courses will be disapproved, even if they have standard content, if they "attribut[e] historical events to supernatural causes." (ER2027.) Although facially viewpoint discriminatory, the Ninth Circuit totally ignored Wilbur's directives.

UC does not dispute that Wilbur was the UC officer over course review, that she testified and wrote as quoted, or that UC staff reviewers rejected courses on the grounds she declared.

(b) UC's "Policy on Religion and Ethics Courses" expressly rejects "courses in religion or ethics" that, even if exemplary in standard content, are "limited to one. . . viewpoint." (ER1485.) UC admits that "most of the disputed religion courses" were rejected on this basis (Opp.14, App.111a), including ethics and philosophy courses, even though such courses are otherwise approved as elective courses. Although the policy is viewpoint discriminatory on its face, the Ninth Circuit found it not discriminatory. (App.4a.)

UC does not dispute that this was a policy (Opp.14, App.111a), or that UC follows the policy to

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20, 223-24).

reject courses that add a single religious viewpoint.

(c) UC's rejections of more than 150 courses gave as reasons their addition of a religious viewpoint--and generally not any deficiency in standard content. UC assures this Court that "if UC disapproves a course, it explains why" (Opp.4), and it did. Examples were given in Petition 6-10, such as a course being evaluated as "pretty good" except for its "Catholic point of view." (Pet.7, ER2369.) All 150 wrongful rejections were quoted in compilations (ER443-86, 750-77), and were filed in the district court as exhibits (n.1 *supra*). The Ninth Circuit, while refusing to apply the overbreadth doctrine or to discuss a single course, flatly denied that UC has a policy or practice of rejecting courses for added religious viewpoints (App.4a), and effectively ruled that this policy or pattern of viewpoint discrimination does not violate the First Amendment. Its only reason was some UC-approved courses with religious content and textbooks, but most dated from before the mid-2004 implementation of UC's policy (ER2413) or from after the mid-2005 deescalation of that policy following the filing of this lawsuit.

UC does not dispute that the 150 courses were rejected, or that all reasons for rejection were accurately quoted in a compilation (ER443-86), or that those reasons were added religious viewpoints in whole or part.

(d) UC has repeatedly admitted in its pleadings that, under its policy or practice, it rejects courses in any academic discipline that "include supernatural or religious explanations." (Opp.11 n.9.) It says "a course may be unsatisfactory precisely *because* it is too narrow or includes only one viewpoint," that "supernatural or religious explanations. . . as overriding

explanations. . . may interfere with teaching the subject" and warrant rejection, and that "UC considers whether a viewpoint or perspective. . . promotes or detracts from a course's ability to meet faculty's expectations." (UC 9th Cir. Br.25.) Thus, UC claims that its course review "*may* make **viewpoint** distinctions" and must evaluate the "**viewpoints** of academic expression." (Opp.29, 26.)

Finding this clear policy or practice of viewpoint discrimination to be irrefutable, though highly embarrassing, UC diverts the discussion to the irrelevant trifles of whether its general course review approach is "reasonable" and "not inconsistent with petitioners' religion" (Opp.5-7). Those are inapposite to whether UC's directives, policies, and practices are viewpoint discrimination, and whether the relevant test is the reasonable basis test. In the process, UC savagely quotes ACSI's expert witnesses out of context, as they found its review of mere course descriptions meaningless like judging books by covers.

II. UC Ignores Its Own Stated Reasons for Rejecting the Five Calvary Courses, and Instead Tries to Replace Them with Post Hoc Rationales.

UC gives every imaginable post hoc rationalization for its course rejections, while not mentioning its actual stated reasons because they unavoidably show its viewpoint discrimination.

A. Elective Course (Religion, Ethics, Philosophy)

UC's stated reason for rejecting Calvary's elective course (religion) was, along with minor points, the school must "demonstrate how the course treats the study of religion from the standpoint of scholarly inquiry." (ER2193.) As UC admits, this language

meant demonstrating how the course was "consistent with UC's Policy on Religion and Ethics Courses" (which falsely dichotomizes "scholarly inquiry" and "one. . . viewpoint"). (ER1172; *see* Opp.14.) Thus, rejection was required by UC's Policy on Religion and Ethics Courses (ER1485), which rejects "courses in religion or ethics" that, regardless of standard content, are "limited to one. . . viewpoint." (Pet.11, 7; ER1485, 1996.) Calvary's course taught standard content. (ER361-62.) Similarly, UC rejected religion courses of Cantwell/Sacred Heart of Mary High School (App.40a), because it added only a Catholic viewpoint and "need[ed] other prospectives [*sic*]" (ER1664).

UC's pretext, created three years later in expert testimony, that it merely follows "the scholarly approach" of disallowing single religious viewpoints is fallacious. There are *two* scholarly approaches (ER2214), the other of which adds the university's viewpoint in not just seminaries but religiously-affiliated universities like Notre Dame, Catholic University, and Princeton. (ER2205-13, Ex.653-55, ER669.)

B. Social Science

UC understandably skips over Calvary's government course (Pet.18).

UC's single stated reason for rejecting the government course was the added religious viewpoint in the text: "Textbook is not appropriate. One sided presentation of history curriculum; needs balance." (ER2007.) Rejection was mandated by UC's policy or practice of rejecting "an American government course [that] provides all standard material on the subject. . . accurately, and in addition, provides a Christian perspective" (Pet.11, 8; ER969), in vivid

contrast to UC's policy approving courses with "a particular [secular] perspective, such as African-American history, Woman's history, or the Latin American Experience." (ER1408.) Calvary's course taught standard content and skills. (ER233-38.)

C. English

UC's stated reason for rejecting Calvary's English course was it "does not offer a non-biased approach" (its added religious perspective) (ER2051) and the text "insists on specific interpretations" (again the added perspective) (SER0427). Rejection was required by UC's policy or practice of rejecting "an English course [that] provides all standard material on English or literature, and in addition, provides a Christian perspective." (Pet.12 n.5, 9; ER967-68.)

UC's reason was not the pretext it fabricated three years later. Calvary's course and its text provided standard content and critical skills (as ACSI's expert testified, ER285-88, 955-58, 285-88, 260-85), and included the required two full-length works (ER512-13).

D. History/Course with Providential Viewpoint

UC's single stated reason for rejecting Calvary's history course was its added religious viewpoint: "Need more than a religious perspective, too slanted toward Christianity." (ER1994.) Rejection was demanded by UC's policy or practice of rejecting history courses with standard content that "attribut[e] historical events to supernatural causes," as stated in UC's form letter. (Pet.12 n.5, 9-10; ER2027.)

UC's reason was not the pretexts it concocted three years later about standard content, as shown by even *its* expert witness testifying the course should have been approved. (ER912.) Standard con-

tent was acceptably taught in the first text (as ACSI's expert testified, ER746-47, 1134-38, 233-37), and was assured by the second text, which was widely used in UC-approved courses, written by America's leading historian of religion. (ER1983, 1987, 2457.)

Because these and other courses were rejected in part for unconstitutional reasons, it is immaterial whether UC can come up with post hoc permissible reasons. *E.g., Board of Educ. v. Pico,* 457 U.S.853, 875 (1982); *Bakke*, 438 U.S. at 320 n.54.

REASONS FOR GRANTING THE PETITION

A. The Ninth Circuit's Ruling, that Effectively Upholds Viewpoint Discrimination by State Universities and Agencies against Religious Speech in Private Schools As Not Violating the First Amendment, Cannot Be Disguised by an Assertion that Vice President Wilbur's Directives, The Policy on Religion and Ethics Courses, the 150 Course Rejections, and UC's Descriptions Were Not a Viewpoint Discriminatory Policy of Rejecting Courses with Standard Content that Add a Religious Viewpoint. It Conflicts with the Seventh, Eight, Tenth, and Fourth Circuits That Find Similar Actions To Be Viewpoint Discriminatory.

UC makes frenzied repetition of its strategic mantra that there is no policy or practice, that no course has been rejected for adding a religious viewpoint.

UC is claiming and practicing power to conduct viewpoint discrimination. UC argues that its course review, and government generally whose "mission by its nature requires evaluations of speech, . . . *may* make **viewpoint** distinctions that *are* reasonably in furtherance of that mission," and "must have the discretion to evaluate the means, content, and **viewpoints** of academic expression." (Opp.29, 26; UC 9th Cir. Br.40, 32.) Recognizing and upholding that claim, the district court held that UC officials "necessarily **facilitate some viewpoints** over others in judging the excellence of those students applying," and may reject courses "out of rational concern about the **academic merit of those religious viewpoints**." (App.25a, 102a.)

The Ninth Circuit tried to evade a ruling as overt as the district court's by falsely asserting that there was no viewpoint discrimination, but unavoidably ruled that UC's actions were not viewpoint discrimination. In doing so, the Ninth Circuit implicitly held that it is not viewpoint discrimination for UC (as described in undisputed evidence above): (a) to reject courses that "provide[] all standard material on the subject" and "in addition, provide[] a Christian perspective," or that "attribut[e] historical events to supernatural causes," as directed by Vice President Wilbur (ER969, 967-68, 1528, 2027); (b) to reject courses that, despite otherwise approvable standard content, are "limited to one. . . viewpoint," as it expressly upheld (App.4a) UC's Policy on Religion and Ethics Courses (ER1485); (c) to reject 150 courses based on stated reasons consisting of their added religious viewpoints and not their standard content; and (d) to assert power and right to "make **viewpoint** distinctions" (Opp.29, 26).

In substance, the Ninth Circuit and UC claim that UC is free from the general principle that "'the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others.'" *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 393, 394 (1993).

B. The Ninth Circuit's Ruling that Only the Minimal Rational Basis Test Must Be Met by Infringements of Freedom of Speech and Other First Amendment Protections When Government Provides a Public Service Conflicts with Decisions of This Court and the Fourth, Seventh, and Eighth Circuits, and Warrants Granting the Petition.

1. The Ninth Circuit Ruling that Viewpoint Discrimination Is Permissible under a Mere Rational Basis Test When "Government Provides a Public Service That . . . Requires . . . Distinctions Based on the Content of Speech" Conflicts with This Court and Other Circuits.

The Ninth Circuit's holding that the rational basis test applies to much, if not most, First Amendment exercise, including claims of viewpoint discrimination or content discrimination (App.2a), is outrageous.

The Ninth Circuit's holding, and UC's argument, that rational basis scrutiny applies to discrimination against speech when "government provides a public service that, by its nature, requires evaluations of and distinctions based on the content of speech" (App.2a, Opp.23), is a blank slate inviting every governmental program to self-commission a need for "evaluations of and distinctions based on the content of speech," just as UC did.

2. The Ninth Circuit's Vast Extrapolation of the *Finley-ALA-Forbes-Hazelwood* Exception and Its Rational Basis Test, from Government Selection among Speech To Subsidize to "Government Provid[ing] a Public Service" and to Regulation of Private Speech, and from Content-Based Decisions to Viewpoint Discrimination, Conflicts with This Court's Decisions.

The Ninth Circuit vastly expanded the narrow *ALA-Finley-Forbes-Hazelwood* exception and its rational basis test, from government selection among speech to subsidize, into whenever "government provides a public service that, by its nature, requires

evaluations of and distinctions based on the content of speech" and into private speech. (App.2a.)

UC asks this Court to extend *ALA-Finley-Forbes-Hazelwood* and its rational basis test still further, to allow viewpoint discrimination. UC claims it "must have the discretion to evaluate the means, content, and **viewpoints** of academic expression," and that whenever "government's mission by its nature requires evaluations of speech, it *may* make **viewpoint** distinctions that *are* reasonably in furtherance of that mission." (Opp.26, 29.) Each of those four decisions expressly forbids viewpoint discrimination (Pet.30), and certainly does not authorize it upon showing a rational basis. Further, UC fabricates a distinction between "invidious" viewpoint discrimination and (fictional) other viewpoint discrimination.

The *ALA-Finley-Forbes-Hazelwood* exception and its minimal scrutiny is not a weapon waiting to be fired against the First Amendment, but a limited exception for government selection among speech that it subsidizes--library offerings, art grants, public television programs, and public high school newspapers. While these may involve content discrimination in that narrow area, they do not authorize content discrimination with a rational basis among private speech or whenever a public service "by its nature, requires evaluations of and distinctions based on the content of speech." Nor does the exception allow viewpoint discrimination at all, instead forbidding it. (Pet.30.) Expanding the *ALA-Finley-Forbes-Hazelwood* exception to private speech and other governmental programs would assault and abridge its First Amendment rights. No circuit but the Ninth Circuit has permitted that.

UC, forcing a square peg into a round hole, de-

scribes its course review as entirely voluntary and optional. (Opp.30.) In reality, private schools are effectively forced to apply for course approval because they would have few students if students were automatically ineligible for regular admission to any of California's state colleges (UC or CSU), and many students are effectively forced to apply because the California state colleges are affordable while out-of-state colleges or private colleges are far more expensive. This is not choice, but unavoidable regulation.

UC's unpersuasive response to the circuit conflict is to claim that the unconstitutionality of viewpoint discrimination in three forum decisions is irrelevant to nonforum cases, and that the particular viewpoint discriminations in three nonforum decisions differ from this case (though *Roach* and *Wigg* similarly involve private speech). All six decisions find illicit viewpoint discrimination in single instances of what here occurred in 150 instances.

C. The Ninth Circuit's Rulings that Rejected the Facial Challenge, Refused To Apply the Overbreadth Doctrine, and Constrictively Reinterpreted the Association Standing Test, Wrongly Led It To Ignore UC's Policy or Practice of Rejecting Courses That Add a Religious Viewpoint to Standard Content. Its Rulings Conflict with Decisions of This Court and Other Circuits (Including by Then-Judge Alito), and Warrant Granting the Petition.

UC's policy or practice of rejecting courses with standard content but added religious viewpoints should have been found unconstitutional on the facial challenge, but UC's actions were upheld; and that policy or practice should have been identified

under the overbreadth doctrine, but that was refused. Instead, the district court's rejection of the facial challenge was on the ground that viewpoint discrimination is permissible if there is a mere rational basis, and its rejection of the as-applied challenge (App.42a, 12a) reiterated refusal to consider any practice or courses under the overbreadth doctrine or under ACSI's associational standing (except five Calvary courses). These holdings were appealed, affirmed (App.3a-4a, 4a-6a), and raised by the Petition, including the Ninth Circuit's refusal to apply the overbreadth doctrine and rewriting of the associational standing test (App.9a-10a, 5a).

1. Refusing To Use the Overbreadth Doctrine.

UC's Opposition does not even attempt to defend the Ninth Circuit's refusal to use the overbreadth doctrine, nor could it in view of conflict with this Court's decisions. (App.38a.)

2. Reinterpreting the Association Standing Test.

The Ninth Circuit's and UC's linchpin in refusing associational standing is that claims and relief "both require 'individualized proof' specific to each rejected course and school." (App.5a, Opp.33.) However, this Court and other circuits (including then-Judge Alito's opinion in *Hospital Council*) do not deny associational standing where "participation of *some* members" is necessary, and the claims and relief do not require participation of *all* members or *all* members with rejection challenges. Here, all course applications and UC rejections were strictly documentary and are in the record, and all relief requested is common declaratory and injunctive relief that UC's policy or practice is unconstitutional of rejections because of added religious viewpoints.

Respectfully submitted,

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MOTION FILED
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No. 09-1461

In The
Supreme Court of the United States

ASSOCIATION OF CHRISTIAN SCHOOLS INTERNATIONAL, *et al.*,

Petitioners,

v.

ROMAN STEARNS, in His Official Capacity as Special Assistant to the President of the University of California, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE* AND BRIEF OF *AMICI CURIAE* THE CATHOLIC LEAGUE AND IGNATIUS PRESS IN SUPPORT OF PETITIONERS

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MOTION OF THE CATHOLIC LEAGUE AND IGNATIUS PRESS FOR LEAVE TO FILE AN *AMICUS CURIAE* BRIEF IN SUPPORT OF THE PETITION FOR WRIT OF *CERTIORARI*

Pursuant to Rule 37 of the Rules of this Court, the Catholic League and Ignatius Press respectfully move for this Court to grant leave to file the attached brief as *amici curiae* in the *Association of Christian Schools International v. Stearns* case. The Petitioners have consented to the filing of this brief. The Respondents have not informed the *amici* as to whether they consent or oppose the filing of this brief.

Amicus, The Catholic League for Religious and Civil Rights, is the nation's largest Catholic civil rights organization, and is located at 450 Seventh Avenue, New York, New York 10123. Founded in 1973, it defends the rights of Catholics, lay and clergy alike, to participate in American life without defamation or discrimination. Headquartered in New York City, the Catholic League has hundreds of thousands of members across the nation.

The Catholic League filed a brief with the Ninth Circuit regarding this case as *amicus curiae*. The Catholic League maintains that high school courses with a religious viewpoint have long met standards of academic excellence, and that attempts to disqualify them from consideration at the University of California are as bogus as they are biased. It further contends that the Association of Christian Schools International merits standing. In addition, the Ninth

Circuit erred when it said that the third prong of the *Hunt* test was not operative. This holding conflicts with holdings in the First, Third and Seventh Circuit courts. It is vitally important for organizations like the Catholic League to know that its members need not personally participate in lawsuits which affect their interests in cases like this one. Associational standing, as the courts have previously recognized, is pivotal to the cause of justice.

Amicus, Ignatius Press, is a Catholic publishing company, based in San Francisco. Ignatius Press was founded in 1978 and has over 1,800 titles in print including authors such as Pope Benedict XVI, Mother Theresa and Mark Twain. It produces textbooks used in Catholic high schools, and is a partner in Universities of Western Civilization ("UoWC"). UoWC has an online Great Books curriculum for high school students (the Liberal Studies Program). The American Council on Education has approved 48 units of this program for advanced college credit. It would be an unjust discrimination against our students if such courses were rejected by the University of California system merely because they were taught from within the Catholic intellectual tradition.

It is for these reasons that *amici* respectfully request this Court grant this motion for leave to file the accompanying brief as *amici curiae*.

Respectfully submitted,

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INTEREST OF *AMICI*[1]

Amicus, Catholic League for Religious and Civil Rights, is the nation's largest Catholic civil rights organization. Founded in 1973, it defends the rights of Catholics, lay and clergy alike, to participate in American life without defamation or discrimination. Headquartered in New York City, the Catholic League has hundreds of thousands of members across the nation.

The Catholic League maintains that high school courses with a religious viewpoint have long met standards of academic excellence, and that attempts to disqualify them from consideration at the University of California are as bogus as they are biased. It further contends that the Association of Christian Schools International merits standing, and that the Ninth Circuit erred when it said that the third prong of the *Hunt* test was not operative.

It is vitally important for organizations like the Catholic League to know that its members need not personally participate in lawsuits which affect its interests in cases like this one. Associational

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[1] The parties were notified ten days prior to the due date of this brief of the intention to file. The Petitioners have consented to the filing of this brief.

No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

standing, as the courts have previously recognized, is pivotal to the cause of justice. We saw how important this was in the case of *Catholic League for Religious and Civil Rights v. City of San Francisco*, 567 F.3d 595 (9th Cir. 2009) without the opportunity to represent our members from San Francisco in a lawsuit against government officials for abridging the First Amendment rights of Catholics, the case likely would never have been litigated.

Amicus, Ignatius Press, is a Catholic publishing company, based in San Francisco. Ignatius Press was founded in 1978 and has over 1,800 titles in print including authors such as Pope Benedict XVI, Mother Theresa and Mark Twain. It produces textbooks used in Catholic high schools, and is a partner in Universities of Western Civilization ("UoWC"). UoWC has an online Great Books curriculum for high school students (the Liberal Studies Program). The American Council on Education has approved 48 units of this program for advanced college credit. It would be an unjust discrimination against our students if such courses were rejected by the University of California system merely because they were taught from within the Catholic intellectual tradition.

It is for these reasons that *amici* respectfully request this Court grant the petition for a writ of certiorari to the Association of Christian Schools International.

STATEMENT OF THE CASE

Amici adopt the statement of the case set forth by Petitioners in the petition for writ of certiorari.

INTRODUCTION

The University of California system ("UC") requires its in-state applicants to take a total of fifteen year-long courses that have been approved by UC. In its review, UC regularly rejects courses regardless of their teaching standard, content and skills. Moreover, if a course provides a religious viewpoint when taught in a Catholic, Jewish or Protestant school, it is also rejected. The Association of Christian Schools International ("ACSI") challenged this practice, but was denied associational standing necessary to bring their claim. The Ninth Circuit held that ACSI could not satisfy the third prong of the test, specifically because the claim asserted or the relief requested required the participation in the lawsuit of each of the individual members. This decision conflicts directly with opinions reached in the First, Third and Seventh Circuits. In addition, the court failed to recognize that associational standing is consistently allowed for injunctive and declaratory relief, as sought here. Therefore, in view of the circuit split, ACSI's petition for a writ of certiorari should be granted.

LEGAL ARGUMENT

I. SUMMARY OF THE ARGUMENT

The University of California has a history of rejecting courses from religious high schools when the instruction provides a religious viewpoint. UC claims that these courses fail to adequately prepare students for collegiate study. Many of the courses include a wide variety of religious and non-religious information taught to enhance student's critical thinking skills in an effort to prepare them for college. The Association of Christian Schools International challenged this policy as violative of their First Amendment and Equal Protection rights. Upon appeal from the United States District Court for the Central District of California, the Ninth Circuit upheld UC's rejection of courses containing a religious viewpoint as they did not violate the religion clauses of the First Amendment or the Equal Protection Clause.

While there are many aspects of the case that should be reviewed, this brief focuses on the court's reinterpretation of the associational standing test, set forth in *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333 (1977). Specifically, the Ninth Circuit erred in holding that ACSI failed to establish the third prong of the test, and thus was denied associational standing. This holding conflicts with the decisions of this Court, as well as the First, Third and Seventh Circuits. Because ACSI satisfies the third prong of the *Hunt* test, this Court should grant the petition for a writ of certiorari.

II. THE NINTH CIRCUIT REINTERPRETED THE ASSOCIATIONAL STANDING TEST CONTRARY TO THE DECISIONS OF THIS COURT, AS WELL AS THE FIRST, THIRD AND SEVENTH CIRCUITS.

The Ninth Circuit reinterpreted the associational standing test set forth in *Hunt*, holding that ACSI failed to satisfy the third prong. *Id.* An association has standing to bring suit on behalf of its members when 1) its members would otherwise have standing to sue in their own right; 2) the interests it seeks to protect are germane to the organization's purpose; and, 3) neither the claim asserted nor the relief requested requires the participation in the lawsuit of each of the individual members. *Id., quoting Warth v. Seldin*, 422 U.S. 490 (1975). Specifically the Ninth Circuit held that, "the plaintiff's as applied claims and the relief they seek, although equitable in nature, both require individualized proof specific to each rejected course and the school that offered it." *Association of Christian Schools International, et al. v. Stearns*, 2010 WL 107035 at *2 (9th Cir. Jan. 12, 2010). This reinterpretation conflicts with the holdings from the First, Third, and Seventh Circuits relative to the third prong of the association test. In addition, the Ninth Circuit failed to recognize that associational standing is consistently allowed for injunctive and declarative relief, as sought here, as opposed to cases in which damages are sought. *Hunt*, 432 U.S. at 343.

The First Circuit interpreted the third prong of the associational standing test in *Playboy Enterprises, Inc. v. Public Service Comm'n of Puerto Rico*, 906 F.2d

25 (1st Cir. 1990). In *Playboy Enterprises*, Playboy Enterprises, Inc. ("PEI") and the Puerto Rico Cable Television Association ("PRCTA") filed suit alleging that the [Puerto Rico] Commonwealth's obscenity statute violated the First Amendment. *Id.* at 27. The defendants argued that neither the Cable Association nor PEI had standing to bring the suit, because only one member of the Association [Teleponce, Inc.] had standing to sue. *Id.* at 33. Therefore, because the claim asserted and relief requested required the participation of an individual member in the lawsuit [Teleponce, Inc.], PRCTA failed the third prong of the associational standing test. The First Circuit panel disagreed with this interpretation stating that "just because a claim may require proof specific to individual members of an association does not mean the members are required to participate *as parties* in the lawsuit." *Id.* at 35. In support of its reasoning, the court referenced this Court's decision in *Warth* which held that an association had no standing to sue on behalf of its members, when seeking monetary relief to compensate its members' injuries. *Id.* Here, the only reason for *requiring* the members' participation as parties was so that the members are eligible to receive their own damages. *Playboy Enterprises*, 906 F.2d at 35. The court stated that "we see no reason why the claim for injunctive relief in this case *requires* the participation of any Cable Association member, or how Teleponce's participation as a party would make a significant difference." *Id.* at 36. Therefore, the court reversed the district court's decision and granted associational standing.

The Third Circuit also dealt with the issue of associational standing in *Hospital Council v. City of Pittsburgh*, 949 F.2d 83 (3rd Cir. 1991). In *Hospital Council*, the Hospital Council of Western Pennsylvania filed suit against several cities and a county alleging that the defendant governmental units had attempted or were attempting to coerce tax exempt member hospitals to make payments in lieu of taxes. *Id.* at 85. Further, the Council alleged those hospitals that did not agree to such payments would have their tax exempt status challenged. *Id.* The defendants argued, and the district court held, that associational standing is improper because the claims asserted and the relief requested require the participation of each individual hospital in the lawsuit. *Id.* at 89. The Third Circuit disagreed noting that the Supreme Court has repeatedly held that requests by an association for declaratory and injunctive relief do not require participation by the association's individual members. *Id.*; *see also Pennell v. City of San Jose*, 485 U.S. 1 (1988). The court also cited *Warth* which held that standing is not barred even if it requires the participation of *some* members as parties, because *Hunt's* prong allows associational standing "so long as the nature of the claim and of the relief sought does not make the individual participation of each injured party indispensable." *Hospital Council*, 949 F.2d at 89, *quoting Warth*, 422 U.S. at 511. As a result the court found that "it appears that an association may assert a claim that requires the participation by *some* members." *Hospital Council* at 89.

Finally, the Seventh Circuit interpreted the third prong of the associational standing test in *Retired Chicago Police Ass'n v. City of Chicago*, 7 F.3d 584 (7th Cir. 1993). In *Retired Chicago Police Ass'n*, a group of City of Chicago employees challenged a settlement agreement reached in state court regarding a dispute over the terms of a health care plan offered by the city. *Id.* at 588. After a string of lawsuits, legislation was enacted changing the terms of the city's health care plans which ultimately raised costs for each annuitant. *Id.* at 589. Among other findings, the district court dismissed the Retired Chicago Police Association's ("RCPA") complaint for lack of associational standing. The district court found that the RCPA could not satisfy the third prong of *Hunt* due to the fact that the claims would require the participation and testimony of individual annuitants. *Id.* at 600. On appeal, the Seventh Circuit began its analysis by first citing *Hospital Council*, and then stating that the approach taken by the Third Circuit was "a sound one." *Id.* at 601. Specifically, the court agreed with the finding that an association may assert a claim that requires participation by *some* members. *Retired Chicago Police Ass'n*, 7 F.3d at 601. "This evidence [that the alleged breach occurred] might be supplied by the evidentiary submissions of some of the members. Each annuitant's presence as a party would not be required." *Id.* at 603. In line with the Third Circuit's reasoning, the court reversed the district court's finding that the RCPA lacked standing.

III. ACSI SATISFIES THE THIRD PRONG OF THE *HUNT* TEST AND THEREFORE SHOULD BE GRANTED ASSOCIATIONAL STANDING.

ACSI challenged the University of California's policy of evaluating courses taken by high school students in order to determine whether they were college preparatory, claiming that the policy violated plaintiff's First Amendment and Equal Protection rights. 2010 WL 107035 at *1. The Ninth Circuit upheld the district court's finding that the third prong of the associational standing test could not be satisfied because "both [claims] require individualized proof specific to each rejected course and the school that offered it." *Id.* at *2. The other circuits that have addressed the associational standing issue conflict with the Ninth Circuit's reinterpretation and would allow ACSI standing. According to the First Circuit, just because a claim may require proof specific to individual members of an association, that does not mean the members are required to participate as parties. *Playboy Enterprises*, 906 F.2d at 35. Requiring each individual school to be a named party in the suit is not only cumbersome but unnecessary. Therefore, as in *Playboy*, the evidence for the relief sought, declarative and injunctive, does not require each party, or specific school, to be named.

Similarly, the Third Circuit would grand ACSI standing. The court found that *Hunt*'s third prong allows associational standing so long as the nature of the claim and of the relief sought does not make the

individual participation of each injured party indispensible. *Hospital Council*, 494 F.2d at 89. Looking toward the nature of the claim, ACSI is challenging UC's policy of rejecting private schools' courses that adequately teach standard content if they add a religious viewpoint. The nature of this claim surely does not make the individual participation of each injured party indispensible. Rather, the nature of the claim requires a thorough analysis of the First Amendment precedent of this Court, and other circuits, in relation to the viewpoint discrimination currently viewed as permissible by the UC system. In addition, evidence of each school's course description and the UC's rejection are contained in UC's documents, thus making the participation of each party unwarranted. Similarly, the Seventh Circuit, having adopted the Third Circuit's interpretation, would also grant ACSI associational standing. Evidence can be provided [supporting the First Amendment and Equal Protection claims] by some of the members, and therefore each individual's presence as a party is not necessary.

Finally, turning toward the relief sought, the Ninth Circuit ignores the practice of this Court and other circuits which have uniformly allowed associational standing for injunctive and declaratory relief, sought here, even while consistently denying standing for damages claims. *See, e.g., Hunt,* 432 U.S. at 343; *Warth*, 422 U.S. at 340-41. The Third Circuit, guided by *Warth,* stated that the only reason for *requiring* the members' participation as parties was

so that the members could receive their own damages, should they receive any. ACSI is not seeking individual damages awards, and therefore individual member participation should not be required.

Requiring individual evidence of each school and each course rejected is unnecessary. ACSI seeks declaratory and injunctive relief. Namely, that the practice of discrediting certain high school courses because they add religious elements, regardless of their appropriate academic substance, violates the First Amendment and the Equal Protection Clause. In essence, ACSI is not seeking a case by case determination regarding the courses rejected. As such, an individual analysis of each school and course is inappropriate. The inquiry is really whether the UC system's rejection of courses in religious high schools is inconsistent with the First Amendment and the Equal Protection Clause. Neither the claim asserted nor the relief requested requires the participation of individual members in this lawsuit. Therefore, the third prong of *Hunt* is satisfied, and both the district court and the Ninth Circuit erred in denying ACSI associational standing.

CONCLUSION

In view of the circuit split discussed above, the petition should be granted.

Respectfully submitted,

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